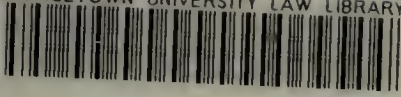


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**Hearing  
Before the  
United States  
Commission on Civil Rights**

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**NATIONAL INDIAN  
CIVIL RIGHTS ISSUES**

**HEARING HELD IN  
WASHINGTON,  
D.C.**

**MARCH 19-20, 1979**

**Volume I: Testimony**



## U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is a temporary, independent, bipartisan agency established by Congress in 1957 and directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
- Submit reports, findings, and recommendations to the President and Congress.

## MEMBERS OF THE COMMISSION

Arthur S. Flemming, *Chairman*

Stephen Horn, *Vice Chairman*

Frankie M. Freeman

Manuel Ruiz, Jr.

Murray Saltzman

Louis Nuñez, *Acting Staff Director*

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## United States Commission on Civil Rights

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Monday, March 19, 1979

The U.S. Commission on Civil Rights met at 9 a.m. in the Federal Maritime Commission Auditorium, Washington, D.C., Chairman Arthur S. Flemming, presiding.

Present: Arthur S. Flemming, Chairman; Stephen Horn, Vice Chairman; Frankie M. Freeman, Commissioner; Manuel Ruiz, Commissioner; Murray Saltzman, Commissioner; Louis Nunez, Staff Director; Frederick Dorsey, Acting General Counsel; Paul Alexander, Assistant General Counsel; Linda Huber, Staff Attorney; Marvin Schwartz, Staff Attorney.

### PROCEEDINGS

CHAIRMAN FLEMMING. My name is Arthur Flemming and I wish to welcome you as Chairman to this public hearing, which will be held in this room for the next 2 days. The other members of the Commission are Vice Chairman Stephen Horn, president of California State University, Long Beach; Ms. Frankie M. Freeman, an attorney specializing in estate and corporation law in St. Louis, Missouri; Manuel Ruiz, an attorney specializing in international law with offices in Los Angeles, California; and Murray Saltzman, rabbi of the Baltimore Hebrew Congregation in Baltimore.

The function of this Commission is to investigate deprivations of equal protection of the laws and to submit our findings to the Congress and to the President, along with recommendations for corrective action. To enable the Commission to fulfill these duties, the Congress has empowered it to hold hearings and issue subpoenas for the attendance of witnesses and for production of documents. This hearing is being held under the authority of the Civil Rights Act of 1957, as amended. As required by law, notice of the hearing was published in the *Federal Register* on February 16, 1979. A copy of this notice will be introduced into the record at this point as Exhibit No. 1.

For the past 18 months, the U.S. Commission on Civil Rights has been examining issues of conflict between Indians and non-Indians and

the roles of State, Federal, and tribal governments in relation to such conflicts. Pursuant to the Commission's statutory authority, we have held two hearings in Seattle, Washington, concerning fishing rights, law enforcement, and community relations; and one hearing in Rapid City, South Dakota, on law enforcement and border town relations.

The hearing that begins today will focus on the role and responsibility of the Federal Government, with particular emphasis on administration of justice issues. Previous Commission efforts have addressed issues of health care, education, and economic development as they relate to the American Indian community.

Most notable are our reports *The Navajo Nation: An American Colony* and *The Southwest Indian Report*. The session we hold today is a public session. The witnesses we will hear have been subpoenaed by the Commission and the schedule, as you will note from the agenda, has been planned in advance. Tomorrow afternoon at 2:15, there will be a session at which persons who have not been subpoenaed but who feel they have relevant testimony may appear and speak.

A Commission hearing is not an attempt to embarrass any governmental entity, group, or individual, but is rather a conscientious and serious attempt to explore problems and relationships which are representative of broader civil rights problems and practices.

Throughout the Commission's 21-year history, it has always sought to be scrupulously honest and fair in its presentations, even though the subject matter may be intrinsically controversial and emotional. The same objectivity will prevail at this hearing and in our consideration of the evidence that is developed at this hearing.

Federal law protects all witnesses subpoenaed to appear before the Commission. The Commission procedures also require the presence of marshals at the hearing.

At this point, I would like to ask one of my colleagues, Commissioner Freeman, to read the rules for this hearing.

COMMISSIONER FREEMAN. Thank you, Dr. Flemming.

At the outset, I should emphasize that the observations I am about to make on the Commission's rules constitute nothing more than brief summaries of the significant provisions. The rules themselves should be consulted for a fuller understanding. Staff members will be available to answer questions which arise during the course of the hearing.

In outlining the procedures which will govern the hearing, I think it is important to explain briefly a special Commission procedure for testimony or evidence which may tend to defame, degrade, or incriminate any person. Section 102(e) of our statute provides:

If the Commission determines that evidence or testimony at any hearing may tend to defame, degrade, or incriminate any person, it shall receive such evidence or testimony in executive session. The Commission shall afford any person defamed, degraded, or incriminated by such evidence or testimony an opportunity to appear and be heard in executive session with a reasonable number

of additional witnesses requested by him before deciding to use such evidence or testimony.

When we use the term "executive session," we mean a session in which only the Commissioners are present, in contrast to a session such as this one in which the public is invited and present. In providing for an executive or closed session for testimony which may tend to defame, degrade, or incriminate any person, Congress clearly intended to give the fullest protection to individuals by affording them an opportunity to show why any testimony which might be damaging to them should not be presented in public.

Congress also wished to minimize damage to reputations as much as possible and to provide persons an opportunity to rebut unfounded charges before they were publicized.

Therefore, the Commission, when appropriate, convenes in executive session prior to the receipt of anticipated defamatory testimony.

Following the presentation of the testimony in executive session, and any statement in opposition to it, the Commissioners review the significance of the testimony and the merit of the opposition to it.

Next, if we find testimony to be of insufficient credibility or the opposition to it to be of sufficient merit, we may refuse to hear certain witnesses even though those witnesses have been subpoenaed to testify in public session.

An executive session is the only portion of any hearing which is not open to the public. The hearing which begins now is open to all and the public is invited and urged to attend all open sessions. All persons who are scheduled to appear who live or work in Washington, D.C., or within 50 miles of this hearing site have been subpoenaed by the Commission.

All testimony at the public sessions will be under oath and will be transcribed verbatim by the official reporter. Everyone who testifies or submits data or evidence is entitled to obtain a copy of the transcript on payment of costs.

In addition, within 60 days after the close of the hearing, a person may ask to correct errors in the transcript of the hearing of his or her testimony. Such requests will be granted only to make the transcript conform to testimony as presented at the hearing.

All witnesses are entitled to be accompanied and advised by counsel. After the witness has been questioned by the Commission, counsel may subject his or her client to reasonable examination within the scope of the questions asked by the Commission. He or she also may make objections on the record and argue briefly the basis for such objections.

Should any witness fail or refuse to follow any order made by the Chairman, or the Commissioner presiding in his absence, his or her behavior will be considered disorderly, and the matter will be referred to the U.S. attorney for enforcement pursuant to the Commission's



statutory powers. If the Commission determines that any witness' testimony tends to defame, degrade, or incriminate any person, that person or his or her counsel may submit written questions which, in the discretion of the Commission, may be put to the witness.

Such person also has a right to request that witnesses be subpoenaed on his or her behalf. All witnesses have a right to submit statements prepared by themselves or others for inclusion in the record, provided they are submitted within the time required by the rules.

Any person who has not been subpoenaed may be permitted, in the discretion of the Commission, to submit a written statement at this public hearing. Such statement will be reviewed by the members of the Commission and made a part of the record.

Witnesses at Commission hearings are protected by the provision of Title 18, U.S. Code, Section 1505, which makes it a crime to threaten, intimidate, or injure witnesses on account of their attendance at government proceedings. The Commission should be immediately informed of any allegations related to possible intimidation of witnesses.

Let me emphasize that we consider this to be a very serious matter, and we will do all in our power to protect witnesses who appear at the hearing.

A copy of the rules which govern this hearing may be secured from a member of the Commission staff. Persons who have been subpoenaed have already been given their copies.

Finally, I should point out that these rules were drafted with the intent of ensuring that Commission hearings are conducted in a fair and impartial manner. In many cases, the Commission has gone significantly beyond congressional requirement in providing safeguards for witnesses and other persons. We have done that in the belief that useful facts can be developed best in an atmosphere of calm and objectivity. We hope that such an atmosphere will prevail at this hearing.

With respect to the conduct of persons in this hearing room, the Commission wants to make clear that all orders by the Chairman must be obeyed. Failure by any person to obey an order by Dr. Flemming, or the Commissioner presiding in his absence, will result in exclusion of the individual from this hearing room and criminal prosecution by the U.S. attorney when required. The Federal marshals stationed in and around this hearing room have been thoroughly instructed by the Commission on hearing procedures and their orders are also to be obeyed.

This hearing will be in public session on Monday and Tuesday of this week. The session today will continue until 5:30 p.m. with a 1-hour break for lunch.

On Tuesday, the final day of this hearing, the session will begin at 9 a.m., and continue to 3:30 p.m. The time between 2:15 p.m. and 3:30 p.m. has been set aside for testimony from persons who have not been subpoenaed, but wish to testify.

As noted by Chairman Flemming, persons wishing to appear at the open session should be in contact with members of the Commission staff in the adjacent staff room throughout today and until 12 noon, Tuesday. Such persons would be heard in the order in which they signed up. I wish to repeat, the time between 2:15 p.m. and 3:30 p.m. has been set aside for testimony for persons who have not been subpoenaed but wish to testify.

Persons wishing to appear in the open session, that is, the open session tomorrow, Tuesday, should be in contact with members of the Commission staff in the adjacent staff room throughout today and until 12 noon tomorrow.

Thank you.

CHAIRMAN FLEMMING. Thank you. Counsel will call the first witnesses.

MR. ALEXANDER. Mr. Deloria and Mr. Pelcyger, would you both remain standing for a moment?

[Philip Samuel Deloria and Robert S. Pelcyger were sworn.]

**TESTIMONY OF PHILIP SAMUEL F. DELORIA, DIRECTOR, AMERICAN INDIAN LAW CENTER, AND ROBERT PELCYGER, NATIVE AMERICAN RIGHTS FUND**

MR. ALEXANDER. Could each of you, starting with Mr. Deloria, identify yourselves for the record, indicating your full name and organizational affiliation?

MR. DELORIA. My name is Philip Samuel Deloria. I am the director of the American Indian Law Center in Albuquerque, New Mexico.

MR. ALEXANDER. Mr. Pelcyger?

MR. PELCYGER. My name is Robert Pelcyger. I'm an attorney with the Native American Rights Fund in Boulder, Colorado.

MR. ALEXANDER. Starting with Mr. Pelcyger, could you briefly tell us what the Native American Rights Fund is and what were the needs that the Native American Rights Fund was set up to meet when it was established?

MR. PELCYGER. The Native American Rights Fund is a private non-profit law firm that provides legal representation to Indians [and] Indian tribes throughout the United States.

It was established in 1970 to provide those services to Indian tribes for legal representation. And I should say that we represent Indian tribes with regard to problems that are unique to Indians, not just to the kinds of problems that they share in common with other Americans or other poor Americans, but uniquely Indian problems by a unique body of laws that are applicable only to Indians and Indian tribes.

MR. ALEXANDER. Given the fact that the United States, at least, has an obligation to represent Indian rights through the Department of Justice, why was it necessary to have a private nonprofit group formed to do what perhaps some people would have viewed to be the responsibility of the United States?

MR. PELCYGER. Well, for several reasons. For one thing, I think the record is clear historically that the agencies in the Federal Government that are charged with enforcing and protecting Indian rights have failed rather dismally.

In many cases, it was found, and it remains the case, that Indian rights are jeopardized by various agencies of the United States Government. And this conflict of interest problem is pervasive throughout the government and prevents, in many instances, the adequate protection of Indian rights.

Third, even in cases where there are not these direct conflicts, there are political problems that make enforcement of Indian rights difficult. And there is also the lethargy of government agencies, that perhaps of all the government bureaucracies that I have come into contact with, they were greatest in the Indian area.

So one of the principal goals for which we were established was to make these government agencies to which we refer accountable to Indians and to try to make them do their job better and more effectively because resources that are available to us, as the Native American Rights Fund, and to other Indians generally cannot be matched in the private area. Resources of the Federal Government need to be mobilized; part of our job was to attempt to do that.

MR. ALEXANDER. Mr. Deloria, could you briefly tell us about the law center and what needs it was to meet, and is to meet?

MR. DELORIA. We'll start with "was."

MR. ALEXANDER. Okay.

MR. DELORIA. In 1967 the dean and the faculty at the University of New Mexico Law School realized that there were very few practicing Indian attorneys that they could locate in the United States. They could only find about 12 serving the entire population of one million Indians in this country. They could only find about five identifiable Indian law students at the time.

So they responded to that need by creating a scholarship program which was funded by the Office of Economic Opportunity. That scholarship program has continued. It is now funded by the Bureau of Indian Affairs. Since that time, we have produced about 250 Indian lawyers, almost all of whom have continued in their careers to serve Indians in one way or another, including parts of my staff and that of the Native American Rights Fund.

As the scholarship program continued, that attracted the attention of the Native tribes and individuals and organizations which bring in their problems to the American Indian Law Center and say: can you help us with this, can you lend a hand in various areas?

So like the Native American Rights Fund, we have simply responded to requests. Our approach has been somewhat different in that we're not a public interest law firm. We do not litigate. We engage in or commit, you might say, policy analysis and training programs, but we do not litigate. I should clarify that the law center now is still affiliated



with the University of New Mexico Law School, but it is a separate corporation.

MR. ALEXANDER. Mr. Pelcyger mentioned the conflict of interest that affects many of the agencies of the Federal Government. Would either of you gentlemen just briefly explain in your view what that conflict is or what the parameters of that conflict are?

MR. PELCYGER. Well, there are different kinds and different magnitudes. But the principal problem is that while the government has undertaken specifically to protect and defend, indeed to develop, Indian resources to make the reservations livable, make them into economically viable and self-sustaining permanent homes for Indian people, various agencies of the government are charged with missions that run counter to that objective.

I think the most flagrant example, certainly in the western part of the United States, deals with the Bureau of Reclamation, which is charged with reclaiming the arid lands of the West and, in many instances, has established and funded and subsidized very large reclamation programs that utilize the waters, the very same waters, that were reserved to the Indians at the time of the establishment of their reservations.

So when it comes to, for example, petitioning the Secretary of the Interior to initiate litigation, to protect and define the Indian rights, or to seek appropriations from Congress to develop a reclamation program for the Indian reservations, you immediately run head on into and encounter the opposition of other agencies—in this case, within the Office [Department] of the Interior, and in other cases, other agencies of the Federal Government that are defending their own interest. This makes it very difficult, sometimes impossible, to obtain Federal assistance.

That's the more direct kind of conflict, and then there are much more subtle, more insidious kinds of conflicts. Even where there are not direct Federal agencies with antagonistic interests, there are substantial interests at stake, and the politics of the problem make it difficult for Federal officials to vindicate and defend and protect Indian rights.

MR. ALEXANDER. During the course of the field hearings that the Civil Rights Commission has held, there has been some testimony periodically about something called equal opportunity for all in the Indian context.

I am aware, Mr. Deloria, that in communications with the Department of Justice, that you indicated that there was a substantial misunderstanding, perhaps, on the part of the American public and some Federal officials about Indian rights versus minority rights. I would like you from the law school perspective to expand on that.

MR. DELORIA. Well, first let me make it clear, Mr. Alexander, that I do think all Indians are equal.

MR. ALEXANDER. Okay.

MR. DELORIA. The problem that we have had—let me just pick up from where Mr. Pelcyger left off—the levels of analysis that are appropriate in any given political situation or conflict with the government are very important for people to understand.

For example, we may have a dispute in which the interest of an Indian tribe conflicts with a non-Indian interest of one kind or another. On the most general, analytical level the United States finds itself in the admitted position of being in conflict with respect to the interests of the general public and especially defined interest of the Indian. In particular cases, we often find, and in conversations with this administration's Department of Justice have found, that whenever particular bureaucrats or political appointees of the government find that they happen to respond more favorably emotionally, politically, intellectually, whatever, to whatever interest is countered to that of the Indian tribe, then they identify that other interest as the interest of the general public.

Now, in fact, it may be the interest of a single irrigation district or a single large agricultural corporation or a small number of fisherpersons or whatever. But the question of whether that is the general public interest, as distinguished from what the Indian interest is, is precisely what the argument should be about, and, in fact, it is something that we understood this system to be established so the court should decide that.

Instead, the frustration that we have is that those things are being decided, sometimes, by one person, who simply feels [one way]. And that is not a legal conflict of interest in the sense that law firms have, when you have to represent General Motors and whoever General Motors argues with at the same time, which you can't do. That's a classic lawyer's conflict of interest that people like Mr. Pelcyger would then find specific rules on how to deal with.

These are conflicts of emotion, conflicts of will, which are then identified as conflicts of interest in which the general public's interest must prevail. And it is very frustrating. And it seems to me that one doesn't deal effectively with that problem by saying: well, it's inherent in the relationship, shrug your shoulders, and walk away.

It is inherent in a sense. And that means that the discussion of public policy should be what is the fairest way to deal with that problem, not simply to say, "Well, let's face it, as much as we like Indians, when your interests conflict with those of the general public, you have to lose because we do have this conflict."

MR. ALEXANDER. Could you, Mr. Pelcyger, indicate in your view what role the judicial and legal system plays in the protection of Indian rights as to, opposed to perhaps, political and economic power of Indian tribes in sustaining and protecting Indian rights?

MR. PELCYGER. Well, I think in order to answer that, you need to go back to the beginning and to understand how this most special Indian rights came into existence.



They did not come into existence by Indian people or their supporters knocking on the door of Congress, seeking special legislation for Indian interests. Rather, it came about because Indian people, Indian tribes, had something that the rest of the country wanted, principally large areas of land and resources that go with that.

So in most instances, the Indians did not petition the government for treaties. Indians didn't petition the government for their reservations. Rather, the government sought them out and sought to confine the Indians to smaller areas of land than they had in their possession and exclusive domain in order to make possible the development—the white development—the non-Indian development of the country for the manifest destiny of the country to be realized.

Now, when the government did that—it's hard to generalize in this area and there are a lot of differences—generally, the government made two promises to the Indian people when it negotiated these treaties, aside from the important differences between the different treaties, between the different reservations.

But generally, when it established reservations, whether it was treaty or statute or executive order, there were two important promises that went along with it. One was that the United States would be the protector, would be the guarantor of that which the Indians retain.

That the government would see to it that what they retained would remain theirs, and they would be defended if indeed the government took on that obligation as a trustee, as a guardian.

The second promise was that the Indian people would be provided a permanent and economically viable and self-sustaining homeland, that the reservations would be made to bloom, that the Federal Government would assist the tribes in transforming their way of life.

Many of the tribes were originally nomadic. They were hunters and gatherers. In order to sustain themselves in that type of economy, they needed very large areas of land. It was implicit in the establishment of the reservations, in confining the tribes to a much smaller area, that there would need to be certain fundamental lifestyle changes, and particularly, that the waters adjacent to the reservations, that border the reservations, that traverse the reservations, that underlie the reservations, would be developed so as to promote the agriculture economy of those reservations.

Now in most cases neither of those promises have been kept, but they form the basis of, at least, the Indian rights to natural resources, and, indeed, in the Supreme Court's leading decision in the water rights area, the *Winters* decision in 1908, was founded on exactly those two promises: that the government would protect the rights of the Indian, and that implicit in the establishment of the reservation was the idea that rights would be reserved for the Indians to fulfill the original promise, so that the reservations would bloom and would become economically self-sustaining.

So the Indian rights were never—did not originate from a gratuitous act on the part of Congress. Rather they were part of a bargaining process. And they did not come about because of the Indian's political leverage. Rather, they came about because, as I indicated, the Indian and something that the rest of the country wanted, and that was the spark—the reason for these treaties to be negotiated.

Indian people are perhaps the most impotent, politically, of any minority interest group in the United States. They simply lack the numbers. They are very widely dispersed. They are not an effective political force.

Therefore, the Indian people, traditionally, have relied to a very, very great extent—I think much greater than any other group that I am aware of—to the Federal judiciary, and have looked to the Federal judiciary for the enforcement of their rights. The political arena is not one that is favorable to their interests.

MR. ALEXANDER. Mr. Deloria, the last decade, at least, has been a major one for Indian litigation. There have been several landmark cases, if you will: the Eastern land claims, the Northwest fishing rights cases, for example. Could you, in a sense, gauge for your view of what the impact has been of these landmark decisions on the ability of tribes to obtain the fruits of those victories and the fallout in the political process?

MR. DELORIA. Well, Mr. Alexander, there is a saying concerning water rights which is "use it or lose it." Currently what this political system is saying with respect to Indian rights, should we use them and lose them, because the response appears to be that the intensity of the resistance on the part of the non-Indian people who are affected by court decisions that are in favor of Indians has led to or contributed to a retrenching on the part of society as a whole, with respect to whether Indians should receive the rights that the courts feel they're entitled to.

It is a very frightening thing that we're going through. You see it in conversations with government officials. But you also see it in the general response. People on television, people in the news, the newspapers and the news shows generally are saying, "We weren't really serious about this."

And if it's going to have an impact on non-Indian people, then maybe these things shouldn't happen. Up until 10 years ago, a lot of the rights that Indians had were on paper, were in the treaties, were in a very favorable legal status that Indians enjoy. And because of the geographic and social and political isolation that Indians have, they had never been tested in a real situation. They existed in courts; language was in the books for anyone to read.

But when it came to applying it to a particular situation, the consequences of tribal government, of tribal sovereignty—the consequences of concepts of Indian land rights applied to a situation where they would actually affect someone other than Indians—came



to be something that apparently this society was not ready to accord, whatever the courts said.

The really disturbing thing for society as a whole is the ease with which people have slipped into a discussion of changing the rules, changing the access of Indians to the court system, changing the amount of resources that are available through the Federal Government to pursue these interests, and looking favorably on the kinds of things we've been discussing this morning.

For example, disregarding the difference between the specific rights that Indians have in the law as opposed to the more generalized rights that people have with respect to land or what they can expect from the Federal Government, balancing out, for example, the rights of tourists in national parks to go, supposedly, anywhere they want at any time, as opposed to the rights of Indians to worship on particular sacred places that have been sacred for over thousands of years.

And somehow, this is a balancing act that the bureaucrats can do on the basis of numbers and how many rolls of film are sold in the concession at the park ranger's office. This is something that is balanced off bureaucratically with a rather callous balancing process.

So I think it puts us in a difficult position, that if we want to maintain our rights, we can maintain them best in the abstract by never trying to exercise them or enforce them. And if we want to really nail them down and use them for our benefit, we run the risk of losing them politically or in an increasingly politically responsive court system, making some new law that we really don't want.

MR. PELCYGER. Let me just add one thing to that.

MR. ALEXANDER. Sure.

MR. PELCYGER. Increasingly, what we find, and I would say particularly in the last 2 or 3 years, in this politicization of the process is the Office of Management and Budget particularly playing a more and more important role. It seems to be almost unwritten law, at least in the response of the Federal Government to Indian problems, that no non-Indian will be made to suffer because of the vindication of Indian rights, whether it be in the hunting and fishing area or Eastern land claims or the water rights area. To the extent that Indian rights are going to dislodge and disrupt non-Indian economic interests, then those should be—that that should not happen, and the insurer has become the Federal Government.

That is, that non-Indians looked at the Federal Government and said: you're the cause of this problem, either by having guaranteed these rights to begin with, or because you haven't enforced them in so long, and because you haven't enforced them for 80, 100, sometimes almost 200 years in the case of some of the Eastern land claims.

Non-Indian economies have come to depend upon the Indian rights or the nonexistence of the Indian rights, so that they are going to "reinstate" these Indian rights—well then, we should be protected from that economic loss. So that has immediate ramifications on the Federal budgetary process.

As a consequence, the Federal budgetary people have loomed larger, larger, and larger in the enforcement of the Federal Government's response to Indian claims. The result is a very great and increasingly so pressure within the Federal establishment to limit the extent of the Indian claims, because the way to keep the Federal contribution, the Federal monetary contribution in Eastern land claims, in water claims, in fishing claims, and so forth—to keep it to the minimum possible extent is to contract the nature of the claim, so that the Federal insurance liability will be minimized, and that becomes very difficult again, particularly, when you see it in the context—you see the budgetary process and the context of the political arrangement.

The Indian people simply lack the kind of political force, the kind of political muscle that it takes to prevail in those kinds of disputes, and that is one of the most difficult and insidious problems I think faced today.

MR. ALEXANDER. In other areas that the Commission has been involved in, and the analogy is clearly not perfect, but in school desegregation, where there has been substantial nonpopularity of a court decision that benefits at least a numerical minority in a community, the Commission report has indicated where the political leadership of the State/Nation, local community supports the very affirmative, moral way, if you will, the court decision, that the process of implementation is much more successful than when it is silent or negative. I'd like both of your analyses in terms of top leadership in this country: for example, the Attorney General, the role that has been played in relation to supporting, for example, *U.S. v. Washington* decision, both by the district court and the circuit court of appeals.

MR. DELORIA. Well, let me just respond briefly. I am not as familiar as probably Mr. Pelcyger in the *U.S. v. Washington*. I think it's clear that in most cases, the land claims in the State of Maine and the Washington situation and other celebrated cases around the country, neither the non-Indian political leadership of the State, nor the leadership of the Federal executive branch has sufficiently projected the notion that the problem could be resolved if people in good will would sit down and try to resolve it.

And if there is a court decision, that that decision can be effectively implemented if people want to. And as a result, of course, as this Commission has been telling the country for a long time, problems have gotten worse because of the failure of leadership.

I think the statements of the Attorney General to committees of Congress with respect to his own personal lack of enthusiasm for the whole notion of Indian rights, the Attorney General having characterized language used by the Supreme Court in its decisions of the last 160 years as being unfortunate, as if they were slips of the quill or something, rather than deliberate statements of policy and law from the Supreme Court, clearly do not give the signal that this administration is intending to implement these rights fully.



Once that word gets out to local officials that the Federal Government at its top levels is indifferent, whether it is a matter of who is enforcing criminal law against non-Indians on Indian reservations, where it is very clear that there is a vacuum and this Justice Department has not made it clear to State and county officials that the law must be enforced and that Indian community or all communities on reservations must be protected and, as a result, people know that they can pretty much do what they want.

Those signals are very clear. One only has to look at American history for the last 20 years to know that when the Federal Government wants someone to know they mean business, they know very well how to get that message across. And they want someone to know that they're resting on their oars, they know how to do that.

MR. ALEXANDER. Mr. Pelcyger, would you care to comment?

MR. PELCYGER. Yes. I think the lessons of the *United States v. Washington* litigation, particularly, are there for everybody to see, and they paint a very extraordinarily discouraging picture.

You have a situation there which, in brief, the Indian fishing rights were created by the Federal district court. They were affirmed by the court of appeals, United States Supreme Court deny certiorari, and, yet, the rights have not been implemented. They haven't been implemented because they have been faced with wide-scale and massive disobedience on the part of the non-Indian fishermen who have been aided and encouraged and abetted by the non-Indian political establishment of both the State and Federal level.

The Ninth Circuit Court of Appeals commented in the 1978 decision that with the possible exception of some desegregation cases, this particular controversy involved the greatest and organized effort to frustrate a Federal district court decree that has been witnessed in this century.

Yet we find in that circumstance, to the best of my knowledge, no major Federal official from the Justice Department speaking out in favor of enforcing the law as it was decreed by the courts. Instead, you have the Attorney General writing to the political leadership of the State of Washington, indicating that he sympathizes with the concerns of the non-Indian fisherman, and, particularly, that he sympathizes with the concerns that this problems was brought about as a result of Federal intervention or involvement on the side of the Indian people.

So as a result, you've had for 5 years a decree of a Federal district court that has gone largely unenforced. And I would suggest, and this again is an example that I think—the political impotency of the Indian people, but if this kind of a confrontation occurred between blacks and whites in the Southern States, it would be page one throughout the United States and carried broadly in the eastern press.

But this confrontation in the State of Washington, which in my opinion is the most severe problem in Federal/State relationships, at least since the civil rights controversy of the fifties, perhaps since the

confrontation in Little Rock, Arkansas, has gone virtually unnoticed, and that, itself, is a symptom of the disease.

You had gotten very close to the point in the State of Washington where the Federal district court judge was about to hold in contempt of court the Supreme Court of the State of Washington for enjoining State officials for carrying out the Federal district court decree.

But in no area in this whole series of events that goes under the heading of the *United States v. Washington*, which is now being reviewed by the Supreme Court of the United States, did you have the top legal offices of the United States saying the law shall be enforced, and it is the responsibility of every citizen of the United States to enforce the law and to respect the law.

MR. ALEXANDER. A number of questions at this time.

COMMISSIONER FREEMAN. Commissioner Horn.

VICE CHAIRMAN HORN. I'd like to ask both you gentlemen this question. You have pointed out in your testimony that there are the traditional conflicts of interest that we all know about. The Bureau of Reclamation wants to build a dam which would affect the waters that Indian reservations feel they have a right to, etc., just as in the situation where presumably they have two clients, those are the easy ones to solve.

What I'd like are your suggestions as to, in your judgment, what is a fair, equitable process by which judgments could be made within the Department of Justice as to when a conflict of interest does arise, whether it is the traditional agency versus treaty, or even agency versus agency, if it is BIA and Reclamation and Interior, and these other types of interests, whereas you point out the United States has a treaty obligation to defend Indian interest and entered into that treaty willingly.

Yet according to you and many others, the evidence seems to be that when it affects non-Indian rights, even though those rights might seem to be represented by an irrigation district, as you've stated, the attitude is well, we need to represent the people of the United States, not our original treaty obligation.

What is the process by which we could determine, within Justice, or within the Federal establishment, when such a conflict arises? That's point one, and what would you suggest as a solution to that? And just as a footnote: we are all aware of the Nixon administration proposal on an Indian Trust Council, so, I'd like both of you to deal with that.

MR. DELORIA. Being the more impulsive one, I'll start and let Mr. Pelcyger collect his thoughts. Let me start with the trust council authority. I objected very strongly to the trust council authority, for the reason that the conflict of interest sometimes works in our favor in the sense that as we've been describing this morning, many of the important decisions that are made that affect us are made by a bureaucrat, sitting around having coffee in their offices and deciding what our rights are, which affects the ultimate position that the United States takes.



And, even though we may lose a lot of important discussions of that nature, at least we're sitting in the room. At some point, someone whose sole job it is to represent Indians is sitting in that room and therefore participates in the discussion. And the fear that I had of the trust council authority was that if such a thing were created, then all of the people whose sole job it is to represent Indians would be moved to a building over in Virginia someplace, who would never be invited to those meetings.

And then every time a discussion was held, in the Interior Department, for example, or the Justice Department, concerning some Federal action that would have an impact on Indians, the scenario would be some public-spirited citizen would say, "Well, what about the Indians?" The answer would be, "Well, the trust council authority can represent them, and if we're infringing on their rights, the courts will decide that."

The problem is many of the issues can be framed in such a way as to make it difficult for the courts to review this. The standard of judicial review of Federal actions is a much stricter standard than the standard of Federal self-analysis of what it's doing. And that where the courts may be reluctant to substitute their judgment for that of Federal officials exercising their discretion, in particular cases—in fact, it's possible and likely that decisions and issues and Federal actions would be planned in such a way in anticipation of litigation by the trust council authority to avoid the possibility of successful challenge on the part of Indians, not to mention the fact that just the cost of having to go to court on everything would be prohibitive, and we'd lose a lot of the smaller decisions that we now can successfully deal with.

So I think the trust council authority, to the extent that it relieves the Department of Justice and the Department of Interior and the Federal Government as a whole of some specific elements of the trust responsibility, I think is a very dangerous thing because it takes us out of the discussion process.

The other problem is that, ultimately, we're never talking about a goal of removing the conflict of interest from the Federal Government. The conflict of interest is inherent, the conflict of interest—the only way you really get rid of the conflict of interest is you get rid of one of the clients that is in conflict. And I think it is safe to say that if the Federal Government disposes of one of its clients, it is not going to be the general public. It's going to be us, and we don't want that.

So we're really talking about moving the conflict of interest around into a manageable position, which was your question. The trust council authority would mean that the conflict of interest would really fall in the Office of Management and Budget and in the Executive Office of the President where policy kinds of decisions and budgetary decisions are made, and that is precisely where too many decisions are now being made. Too many decisions involving legal rights and involving the highest policy of this country with respect to many domestic mat-

ters, not to mention human rights matters, are made by people who are thinking strictly in terms of the budgetary impact.

And there is a separate adversary system from which we are excluded, which is an adversary system revolving around budgetary questions. And who is going to compensate non-Indian trespassers and other kinds of people who are enjoying Indian rights now?

The Indians continue to bear the burden of whatever wrongs have been committed against them in the past. Now, with respect to what is a manageable system, one is always reluctant to pile another system on top of the many systems we have in the government now. And, with some hesitation then, I would suggest that some process by which, at the earliest stage possible in the Federal planning process, a requirement that the Bureau of Indian Affairs, the Solicitor's Office, the Office of Indian Trust, whatever it's called in the Department of Justice that's responsible for Indian matters, be informed of a possible Indian impact of a proposed Federal action.

And that a process then be designed whereby—and the tribes and Indian individuals who are affected by this—process then be designed whereby decisions that are made through the course of that Federal action, whether it is a plan in the irrigation district or dam or creation of a national park, whatever, throughout that process, the resolution of problems be made in some open form that is open to public scrutiny, rather than—and has some, at least, rudiments of due process, so that the agencies that are charged with representing Indians and the Indians themselves have an opportunity to participate to some extent and enter their positions, enter their feelings on particular decisions that are being made. And that the public, the courts, and Indians themselves eventually have the opportunity to track this process—who decided what and on what basis did they decide it—so we can at least, at the minimum, make a record for appeal, because once we get in the situation—

The conversation we had with the Justice Department several months ago, we were told by high officials in the Justice Department that they had a conflict in the State of Maine because their responsibilities to Indians were only statutory responsibilities, and they also had statutory responsibilities in Maine.

We asked them what they were, what statute requires them to represent the people of Maine, who have a legislature and an attorney general and a governor and all kinds of things so they can represent themselves. What was their obligation to the people in Maine?

Well, they couldn't name any. But they felt that they must have because, like that side of the argument—well, that kind of feeling is inevitable. The point is, at the earliest stage possible, Federal officials should be required to say on the record, "I like these guys, I'm not too crazy about the Indians on this one, I like the other guys, so I'm going to decide to resolve questions in favor of the other guys" and it's on a piece of paper, so that eventually we can hold them to that record.



Now, I don't know exactly how that process should work because, among other things, the Office of Management and Budget will oppose it because it's going to cost money—but some process where you force it out in the open rather than having a bunch of middle level people making these decisions behind closed doors.

We can't even get invited to the meeting because they name each other as lawyers and clients, and we're just people who happen to be sitting outside and do not have any standing to even attend most of the meetings.

VICE CHAIRMAN HORN. Well, you raise—before we go to your answer, I'd just like to get what I get out of that answer. You raised a very interesting suggestion, which is that there be an Indian impact statement similar to environmental impact statements, economic impact statements, etc., that are made on the basis of the consequences and alternatives that revolve around a particular decision.

And you're suggesting an administrative process within the Department of Justice where other Federal agencies or interests could also surface, so that all of the various facets of the question could be put into the open. And the parties within the Federal establishment could make their views known. And others, such as the Indian interests, which are both in and out of the Federal establishment, could make their views known before a decision is finally taken as to which side the Department of Justice will lend the prestige of the United States Government.

Then if the decision is made that they will not side with what might be perceived to be the Indian interest, what do you suggest the alternative be at that point, after the administrative process? Should there be after that process a council that also represents the Government of the United States, but represents the Indian interests, and that council clashes with the Solicitor General or the Attorney General in court?

MR. DELORIA. Mr. Pelcyger may differ very strongly with me on this. My fear is kind of a slippery-slope fear. And that is, once you create Federal employees who are in a separate organization, who have trust responsibilities with respect to Indians, the tendency is going to be then for the people who have the conflict of interest to more easily resolve it against the Indians, in the confidence that somebody over there—I mean, that's a classic—the people in this town are experts at that.

They're going to say, "Well, heck, somebody else will handle it, somebody else gets paid for handling this. Why should I even seriously consider the Indian interest and have that hanging around my neck for the rest of this particular series of decisions, when I can just decide against them at the outset." And then it will drag on in court forever.

That's my fear. It seems to me, it might be better—once again, we're getting into budgetary impact—it might be better to make them pay for private attorneys for the Indians to sue them once we've made a record and the decision has been made against them.

Now one more thing. I know Bob has probably got much better things to say than I do. One more thing is the problem is once you say "impact statement" in this town, you get sighs and people slapping their foreheads.

There seems to be a feeling that every special interest group—and despite the special nature of our legal rights, we are considered by some to be only a special interest group—every special interest group now has an impact statement required, and it simply adds to the Federal paperwork.

I think that there are devices that can be designed, or at least we could rename it, not call it impact statement. But something that gives us notice as soon as possible, because otherwise, the budgetary things start working against us. If an agency has put \$20 million into planning a project before we find out about it, then we start out \$20 million in the hole getting people to consider alternatives, because you start talking about cost-benefit. And the cost of changing their mind is charged off to our interest, because it is a cost they undertook for us.

So that if they have to buy out non-Indian farmers who are using water that is our water, that goes into the cost-benefit analysis of a project that's for us, which makes it too expensive. So that's why we have to know as soon as possible. But "impact statement"—we have to call it something else.

VICE CHAIRMAN HORN. Yes, sir?

MR. PELCYGER. I'll be very brief because I agree basically what with what Sam has said. I think the Indian Trust Council Authority would be counterproductive for the reasons that Sam gave because it could be extremely vulnerable to the political process and to appropriations being cut off and for the tribes to be left without effective representation. That's more difficult to do when Indian representation forms a relatively small part of a much larger budget of the Interior and Justice Departments, and also because it would make the Interior and the Justice Departments into enemies no longer charged with protecting Indian rights.

I think one thing that's key here is full disclosure when the Federal Government decides that it cannot in good conscience or for whatever reason, fully and fairly represent the Indian interests—by "fully" I mean in order for the Indians to be bound in court when they are represented by the United States, it must be as full and complete a representation as a private trustee is to his beneficiary.

And that's something that is not really understood by, I think, either the Interior or the Justice Departments. They say they represent both the United States of America, and they can make independent judgments about the quality of representation that's afforded; my response is that, "Yes, you are the United States of America, but when by virtue of your representation there are real, live people out there who are being bound by your representation, that under our judicial system, they can't be bound unless there is full and completely loyal representation to that interest."



Part of the problem is that the Department of Justice people see themselves not as advocates, not as lawyers in the way that we see ourselves, but rather as judges, that somehow theirs is not only to argue and to advocate, but also to judge. And when we get into that situation, we have real problems, because by their judging, they are foreclosing the real judges from making a fair decision.

VICE CHAIRMAN HORN. Of course, that's the point Attorney General Bell has stressed, that he doesn't like to be put in the position of being the judge and foreclosing the judges from serving that role.

MR. PELCYGER. But he's not. If he would be an advocate, if he would be an advocate who would resolve doubt and ambiguities in favor of the Indians, as Chief Justice Marshall said in *Worcester v. Georgia* 150 years ago—it's remarkable how much wisdom is contained in Chief Justice Marshall's opinion in the original Supreme Court, because these problems were foreseen, the political nature of the problem was foreseen. And his rule was: when you have a doubt, in order to fulfill the promises that were made to the Indian people, the doubts have to be resolved in the Indians' favor.

That's not the role of a judge. That's the kind of role that attorneys fill for beneficiaries for the trust throughout our history and every day in our affairs other than Indian affairs. Now, when there is a real conflict—and sometimes there is; sometimes, for example, there's a conflict between Indian tribes. You could have two or more Indian tribes with competing claims to the same water resource.

MR. DELORIA. They don't think that's a conflict.

MR. PELCYGER. Yes. That's the point. When those conflicts occur, I think the only way out is to fully disclose the nature of that conflict to the court and to provide funds for Indians to be separately represented.

CHAIRMAN FLEMMING. Commissioner Freeman?

COMMISSIONER FREEMAN. Gentlemen, I would like to move from the Department of Justice to a question concerning the implementation by the Department of Interior of its trust responsibilities, and ask you to comment on a specific situation.

This Commission held hearings—we began our study of Indian problems with hearings in Phoenix and Albuquerque, followed by that in Window Rock, and received a great deal of testimony concerning the contracts negotiated by the Bureau of Indian Affairs.

Particularly, I am reminded of testimony which indicated that there was a contract negotiated with respect to coal. The coal company—the contract negotiated by the Bureau of Indian Affairs for this coal, the Indian tribes receive 25 cents a ton.

In response to the question as to whether it could be renegotiated because there was a complaint from the tribe that it was not receiving adequate money for it, that it was closed and could not be renegotiated. And as we recognize the focus of the energy problem and also, as you say, it is the responsibility of the Department of Interi-

or to assure that the tribe is economically self-sustained, I still remember that 25 cents a ton. And I saw it then as a rip-off.

I wonder if you could tell me the extent to which the trust responsibility in such situations is changed, or how does the Department of Interior carry out responsibilities in terms of minerals, oil, or whatever that are owned by the tribes. Could you comment on that?

MR. PELCYGER. Well, generally, let me say that first of all, I think the situation over the past 10 years, the situation within the Interior Department, has improved dramatically. I think the current officials of the Interior Department, from the Secretary on down, including the Solicitor, take the trust responsibility very seriously.

That's not to say that they're right or they're where I would like them to be. But I think over the past 10 years, the evolution has been positive.

COMMISSIONER FREEMAN. Are you saying that there would be no such contract now?

MR. PELCYGER. No, I'm not saying that. But I am saying that in a number of instances—I don't know the particular one that came to your attention in Phoenix or Albuquerque—but I do know that in a number of instances, the Interior Department has supported the tribe's position that the original leases were not valid for one reason or another because in one case I know that we dealt with they had exceeded the acreage limitation, and in other cases, they didn't adequately comply or didn't comply at all with the National Environmental Policy Act. And in other instances, where there remain these—once the lease is signed, there are a number of steps that it takes to implement it—filing and binding plans and so forth.

And the Interior Department has generally been helpful in terms of the Indians gaining additional bargaining position. One of the problems with this originally was that when a lot of these Indian leases, with coal particularly, were signed, all the coal on Federal lands, that is non-Indian lands, there was automatic royalty of 17.5 cents per ton.

So whenever they figured out, "Well, what's the fair royalty value for the Indians to get in these leases?" the market was established, not by a market analysis, but by a flat royalty rate of 17.5 cents per ton, which served then as a ceiling on the Indian royalties, because that was, for all intents and purposes, the available market.

Now, a number of years ago, we achieved a major breakthrough on behalf of the Crows and renegotiated a contract to the point where they got 44 cents a ton. And that was—and the Interior Department was very helpful in that process.

Subsequently the Interior Department began looking and saying, "Well, the Indians get 44 cents per ton for Indian coal, maybe we ought to be getting a lot more for the coal on government land." So they were appreciative and thankful that the Indians had some private representation that was able to help them.



Now, I'm not saying—I don't know the particulars that came to your attention in your hearings. But at least generally speaking, I think the Interior Department has been positive in a number of instances that I know of in renegotiating those leases and for the Indians to get higher royalties.

MR. DELORIA. I have a couple of things. One was, most of the leases that are attracting the public's attention now and are being used as examples of the failure of the trust responsibility are leases that were negotiated at a time when only the energy companies knew there was going to be an energy crisis.

The general public felt that coal, strip-mined, stripable coal was probably one of the least important and least valuable natural resources that anyone could have. And I think there was a sincere, genuine feeling on the part of a lot of people in the 1960s that you sell that stuff for whatever you can get somebody to buy it for because we have all the oil we're ever going to need. And then there's going to be the sun and nuclear energy, and whoever was going to burn coal again.

So part of that response I think was simply ignorance and failure to project ahead, part of it is that in the nature of the trust responsibility, as you're dealing with Federal employees who have to come from someplace, and people—it's hard to get real experts in these fields to work for the Federal Government, when they can make so much more money working for the energy company.

And all of these fields tend to be fairly closed circles between universities and consulting firms and the companies and the Government. And one stops and rests in the Government for a couple of years and regains one's strength to go out to make more money again and learn more about how the Government works.

So that the Government's participation in that cycle—and this applies to the field of education as well as to energy. It's not peculiar to energy. The Government's participation in that is not a real healthy position from which to be an advocate for Indian interests.

Another problem is back to the budgetary problem. The Interior Department has never had the money or the ability to set up the kind of mechanism necessary to adequately represent Indian interests in the sense, for example, of having a separate civil service system, some way to really get good advice.

Another problem has been the fact that the tendency of both tribes and the United States has been to approach Indian development, viewing the tribes as landowners strictly rather than as government. So they tried to put everything conceivable in a lease which you and I would do if we were leasing our private land, but in that lease also waive most of their powers as a government.

For example, to impose a severance tax, we have to go back and litigate our right and our power to impose a severance tax, whereas it is taken for granted with respect to every other government. The

power to impose environmental regulations, we feel we've had that all along. But in some respects, those things have been waived in the leases. And we may have to litigate to reestablish the right that we had because we've been viewed as—or in viewing ourselves as landowners solely, and not as governments who are major landowners.

I think it's fair and important to point out that most of the tribes that are now suffering with leases that don't compare with leases that have been made since World War II and after in Asia, in South America, and in the Islands, way behind.

Most of these tribes have been represented all along by some very high-paid private law firms, who occupy some nice offices in this very town. So I think—I'm not defending the Bureau of Indian Affairs, the Interior Department and all. But I think we have to see the total context of who was asleep at the wheel, the total context of who had the resources to do something, and see that it's a little too easy to identify some bad guys in the Interior Department, when there are a lot of people snoozing when they shouldn't have been.

COMMISSIONER FREEMAN. Thank you.

CHAIRMAN FLEMMING. Commissioner Ruiz?

COMMISSIONER RUIZ. Yes, I have a question with respect to how far back you've gone in order to protect these rights—for example, in the area of Indian tribal rights to water in the Southwest.

Our Pueblos in our cities in California and their prior and preemptive rights to water have been protected by our treaty acquisitions from Mexico. Have the Indian tribes ever urged their preemptive rights to water under the treaty of Guadelupe-Hidalgo, wherein, under Mexican law, they were possessed of all civil rights and property rights, and respected by the United States treaty.

In making treaties with the United States, did the Indians specifically give up water rights which the Government of the United States had already agreed to protect in their favor when it received the Southwestern States under the treaty of Guadelupe-Hidalgo, which was a solemn treaty obligation by the United States in favor of native Indians and their descendants in the Southwest.

I'm just going to give you one illustration. In the State of California, an Indian chief by the name of Sovano received a grant of land from the Mexican Government. In 1851, the United States Government set up a commission to confirm private land grants received by the prior citizens of Mexico.

In the district court and the circuit court, the United States court said, "Well, that Indian doesn't have anything because under the laws of the United States, he does not have civil rights." The United States Supreme Court said, "Wait a minute, you're wrong here. These rights are derived by virtue of treaties."

And Sovano retained his 48,000 acres of land. Now, my question is I've heard of Tijerina in New Mexico. I've heard of the Pueblo rights. I've heard of some sort of going back into that. But how seriously have



you gone into that, taken some of these old cases that fit in with Chief Justice Marshall's opinion, which reinforces the rights of Indians in the Southwest and fits and joins in with that? How far have you gone into that with relation to your fundamental rights? I'd like an answer from either of you.

MR. PELCYGER. Well, the prime case that I know of that involves the Indians going back to the rights that they possessed under prior sovereignty involves water rights litigation for the Pueblos that is now proceeding in the district court in New Mexico, where the effort there is to try to—the Pueblos, unlike most of the other tribes, their title actually was derived from—they had land grants under the prior sovereignties, which, as you suggest under the treaty of Guadalupe-Hidalgo, were recognized and confirmed by the United States.

There is a rather massive effort in that case, which I'm not particularly involved, but I keep up with, to ascertain the nature of the water rights that were appurtenant to those Pueblos under Mexican law. So that is proceeding in that case. That's the prime example that I know of.

Now, in no case that I'm aware of, in answer to your other question, do any of the treaties in the Southwest give up water rights that the Indians previously had. In most cases that I'm aware of, in fact, no cases that I'm aware of, is water even specifically mentioned in the treaty.

In the *Winters* decision the Supreme Court says essentially two things: that by failing to mention water in the treaty in the agreement means that the Indians retain their prior rights because under the concept of a reserved right, the Indians retain everything that is not specifically given up. It's not specifically given up; therefore, the Indians still have it.

COMMISSIONER RUIZ. I make reference to this because more recently in Mexico, they're doing the same thing down there with respect to this area going back to the Indians, the rights to water, etc. And the Supreme Court down there has gotten behind the Indians with respect to rights they they always had.

Now they've discovered oil in Mexico. The United States is very much interested and sensitive to the philosophy of pro-Indian that Mexico has. I would suggest, sir, that you might write me a note, and I might give you some decisions that could be of interest because I don't know whether this has been gone into.

MR. PELCYGER. I'd like to follow up on that.

CHAIRMAN FLEMMING. Commissioner Saltzman?

COMMISSIONER SALTZMAN. No questions.

CHAIRMAN FLEMMING. Do you have one additional question?

MR. ALEXANDER. Sure. In some of our field hearings, the notion has come up from time to time, and I guess a number of public officials have stated it, that these are old obligations, these treaties. And people who are alive today didn't sign those treaties. They shouldn't suffer for

them. These are some of the things that have been stated, and that maybe it's time to bite the bullet, I suppose, as the people in the State of Washington would phrase it.

I'd like you both to comment on that from a legal point of view and also a moral point of view, if you will.

MR. DELORIA. I'm the moralist, Mr. Pelcyger is the lawyer so—I'll start.

MR. ALEXANDER. You can switch roles if you want.

MR. PELCYGER. Are they mutually exclusive, do you think?

[General laughter.]

MR. DELORIA. I think this relates to Commissioner Ruiz' question very well. Part of the problem we're having is in dealing with the various government agencies, the Justice Department, when litigation comes as to what is a good argument to make, how far back do you go?

And a part of our problem has been, they will say, "We don't want to drag up all of this stuff out of the past, those are arguments that we don't want to use; it's going to work against us politically. So we don't really need your kibitzing on how to structure an argument. We're the lawyers that represent you so we don't want to hear about that."

And a lot of what you will be hearing for the next 2 days will involve some very strong feelings about whether the government, even when it does undertake litigation on behalf of Indians, is making the right argument. And part of the complexity of this relationship is a right argument in one case may come back and work against either us or

the government in another case.

And it's all the complexities of this decisionmaking, that we only participate partially. And then at a certain point, the bureaucratic curtain drops, and a decision is made that we are not involved in. It's difficult, given the history of the past 200 years, to have a lot of confidence that these decisions are always made on the basis of what's the best lease strategy for Indians, and are not made for other political and economic reasons.

COMMISSIONER RUIZ. You will agree that options are good to have though, in order to find out—

MR. DELORIA. Absolutely. That's what our discussion tries to be. And they don't want to hear it.

COMMISSIONER RUIZ. So if you have various and sundry options with relation to chewing this down to an ultimate issue, you're in a better political position, you're in a better fighting position. And that's one of the reasons I mentioned, that's all.

MR. DELORIA. Yes. That's the same frustration that we have, is that the options and the choosing of options and the describing of options is a process that we can't get our hands on, that we can't participate in, so that's what relates to your question.



The argument that why should the present generation of Americans bear these burdens, these Americans who didn't sign these treaties. This generation of Americans also didn't ratify the Constitution. This generation of Americans didn't pass the first 10 amendments or the 13th or 14th or whatever.

So the notion—and it's an example of the peculiar understanding, a separate understanding of what Indian rights are. There is—no one in a position to influence public opinion has trouble with the concept of a Nation, the United States, any kind of concept of a corporate existence of the United States, or a corporate responsibility. Most of the treaties, or many of the treaties that the United States has, that obligate them to draft us and send us all over the world to fight if somebody decides, the people who signed those and ratified those are no longer alive or are no longer in the Government.

What does that have to do with anything? So the argument that somehow legal obligations expire as each Congress expires is one that has no legal merit, that I know of. I'm the moralist. He's the lawyer.

The other thing is that the burden analysis is an interesting one because the alternative is if the burden is not be shared by 220 million Americans, then it will continue to be shared by only Indians who are affected.

So the Indians in Maine will continue not to have the land that they're entitled to or compensation for it, and continue to bear that burden; so that no non-Indian, even somebody in the Office of Management and Budget will be inconvenienced in the slightest; that the Indians in the State of Washington should continue to not fish despite what the treaty gives them and the courts have said the treaty gives them; so that no sport fishermen in the State of Washington who is non-Indian will miss one Saturday afternoon's fishing; that the Indians in the Southwest will continue to not be able to develop the economic resources of their reservations so that there will be enough water for the swimming pools in Phoenix; and if we continue and we continue to bear the burden for reasons that have nothing to do with the legal or the moral issues.

MR. ALEXANDER. Mr. Pelcyger, would you like to comment?

MR. PELCYGER. Yes, now that I've been disqualified on moralism by my colleague here—such is the cross that lawyers bear these days. Just a couple of comments. First of all, I think it would be helpful for the Commission to see all of these legal controversies that are being fought as coming about precisely because the government has failed to honor the original promise; precisely because the Indian people are the most, on any scale, the most impoverished of any minority group or any group of people in the United States, despite the fact that they have potential claims to vast, vast resources that is worth, in our currency, billions, perhaps even trillions of dollars.

That is a promise that is unfulfilled—that these reservations are wastelands. Instead of supporting economically self-sustaining Indian

communities, they are too often impoverished areas. And all of these legal types that you've been hearing about and will continue to hear about come about because of the tension that that has created.

So my first response to the question is that these rights are not relics; they're not antiques precisely because the promise that they were intended to bring about has never been fulfilled. It remains unfulfilled to this day.

Secondly, when the Indian forefathers negotiated these treaties, the treaties were to last for as long as the rivers run. Many of the rivers have dried up through no fault of their own—but for as long as the grass grows. They were intended to be perpetual. They were rights that were secured by the Indian people for their children and for their children's children.

And it was in that sense very much like the Constitution of the United States or the Declaration of Independence. They were not for a specific time period. They were perpetual. They were forever.

And third, I would ask the people to fight out for equality in a sense, to look at critically our society, and to see the children of wealth, the children who inherit wealth, and that wealth is passed on from generation to generation; why the Indians—why cut off their heritage in this sense, which is a much more profound and unique heritage. That kind of inherited wealth passes on from generation to generation and is accepted by this society—and encouraged by it.

MR. ALEXANDER. Do you think there is any relationship between the way the United States treats Indian rights and the general security that the rest of the public can have in terms of the treatment by this government?

I'm reminded of the—this is a statement from Felix Cohen's—about the miner's canary—as to whether Indian rights are a miner's canary or a safety warning to the rest of society. From your experiences, do you think that has any validity?

CHAIRMAN FLEMMING. I ask for just a brief answer to the question. I appreciate that it could be longer.

MR. PELCYGER. Well, the answer is yes. One of the peculiar fascinations for me is to look at the whole history of Indian and government relations. You'll see a real microcosm view of how the government relates to all minority groups, and you can see a model for all possible kinds of relationships. As that has changed over 200 years of our history, it reveals, I think, in a very fascinating way the moral stance, particularly, of our government.

CHAIRMAN FLEMMING. I want to express my deep appreciation for the testimony you have provided and for the way in which you responded to the questions. Along with Commissioner Freeman, I did preside at the hearing in Seattle. And I just want to say that the characterization which you've provided us of the situation relative to the Washington case is one in which I find myself in great sympathy, growing out of our experiences in Seattle, as well as our observations in other places.

But we do appreciate both of you coming here and providing us with this very fine testimony. Thank you very much.

Counsel will call the next witnesses please?

MR. ALEXANDER. Theodore Means, Wendell Chino, Barbara Namias, Clyde Bellecourt.

[Clyde Bellecourt, Theodore Means, Wendell Chino, and Barbara Namias were sworn.]

TESTIMONY OF CLYDE BELLECOURT, COORDINATOR, FEDERATION OF NATIVE-CONTROLLED SURVIVAL SCHOOLS; THEODORE MEANS, FIELD REPRESENTATIVE, AMERICAN INDIAN MOVEMENT; WENDELL CHINO, PRESIDENT, MESCALERO APACHE TRIBE; AND BARBARA NAMIAS, DIRECTOR, NATIVE AMERICAN AFFAIRS OFFICE, AMERICAN FRIENDS SERVICE COMMITTEE

MR. SCHWARTZ. Beginning with Mr. Bellecourt, would you each please state your name, address, and tribal affiliation and occupation for the record?

MR. BELLECOURT. My name is Clyde Bellecourt. I'm a member of the Ojibwa Nation. I reside in Minneapolis, Minnesota. I work as the coordinator of the Federation of Native-Controlled Survival Schools.

MR. MEANS. Ted Means, Oglala, Lakota. I reside on Pine Ridge Reservation, Porcupine, South Dakota, and work as administrator of legal survival group. I am the field representative of the American Indian Movement.

MR. SCHWARTZ. Excuse me. As each of you speak and throughout the questioning—I notice that we have three microphones for four of you—I would appreciate it if you'd get as close to the microphone as you can so we will be able to hear you. Mr. Chino?

MR. CHINO. My name is Wendell Chino, and I'm president of the Mescalero Apache tribe.

MR. SCHWARTZ. Thank you. Ms. Namias?

MS. NAMIAS. My name is Barbara Namias. I'm a member of the Mohawk Nation at Akwesasne. I reside here in Washington, D.C. I'm the director of the Native American Affairs Office of the American Friends Service Committee.

MR. SCHWARTZ. Thank you. Mr. Bellecourt, the situation in which you normally find yourself is an urban setting, as I understand it, in the city of Minneapolis. I would like you to describe for this Commission the characteristics of the urban Indian community in Minneapolis with which you are familiar, and the particular problems, particularly from a civil rights standpoint, that the Indians in that community face.

MR. BELLECOURT. Of course, I can only speak about the situation in Minneapolis, Minnesota, where I reside. I'm one of the founders of the American Indian Movement, which was formed during July 1968.

The purpose of this organization, of course, we felt that none of the existing organizations—I'm talking about 22 other so-called Indian or-



ganizations that exist in Minneapolis; I'm also talking about the United States Civil Rights Commission and the Human Rights Commission in Minneapolis' Civil Rights Department.

We felt that little or nothing was being done to protect the rights of Indian people. We felt that little or nothing was being done to upgrade the conditions of Indian people. And when we formed in July of 1968 of course, we thought little or nothing was being done to retain the culture of Indian people. We formed because we didn't feel that there was effective Indian voice in that particular area—I'm speaking on behalf of Indian people.

We formed basically around issues that have confronted us all of our lives. When we formed the American Indian Movement, we looked at the Minnesota Council of Churches, the Department of Indian Work, all other denominations in that State, as working in collusion with the Federal Government, the Federal system of education.

We looked at the Bureau of Indian Affairs and the Office of Education as working hand-in-hand to strip us of our natural heritage, of our natural culture, and the end result, of course, is to remove us from our land and resources.

The situation that faced the people in the State of Minnesota was no different in that period of time than the situation throughout the United States.

MR. SCHWARTZ. Could you describe that situation in some detail. The particular problems that you were facing then?

MR. BELLECOURT. Well, in the city of Minneapolis, we had a severe housing problem. We have very severe problems dealing with the court system, the Minnesota legal system. We have serious problems in the area of education; 85 percent of our students that enter high school are not graduating.

And it is around these specific conditions, of course, that we formulated our organization. We developed and we still operate today many programs that are taking care of Indian people in these various areas.

MR. SCHWARTZ. I'd like to go into some of those programs with you. First, I'd like to look at the individual problems. One of the first that you mentioned was housing. Can you describe precisely what the housing problem was and then how your organization went about seeking solutions to that problem?

MR. BELLECOURT. The housing problems, of course, in the city of Minneapolis were quite severe, as they are throughout Indian country. An estimated 85 percent of Indian housing in the city of Minneapolis was substandard. We've found situations where as many as three different families were living in one- or two-bedroom apartments.

We've found situations in the city of Minneapolis where Indian people are residing in cars, trailers, sleeping in garages. We did our own surveys and studies and have attempted to advocate on behalf of Indian people that they build adequate housing for us.

MR. SCHWARTZ. At the time that you were making these observations, were the people involved attempting to utilize either the Federal Government or the State government facilities or programs that might have existed then to deal with those problems?

MR. BELLECOURT. I think the Indian people have utilized every opportunity available to them. But our feeling at the time was that many of the programs that are designed for us, the services are never delivered. It is the feeling by our community that Indian people must play a more active role in the delivery, the maintaining of the services that would be established.

In the city of Minneapolis, of course, we were successful. Like I stated earlier, we looked at education, the American Indian Movement looked at education, the Christian Church, the Federal Bureau of Indian Affairs system as the three worst enemies of Indian people.

And we demonstrated, as everybody knows, quite heavily against these three institutions. We challenged the Minnesota Council of Churches to find out that over a 10-year period of time, utilized what they call the Minnesota Council of Churches' Department of Indian Work, which has no Indian people employed with that agency and no Indian people on its board of directors.

We found out that this agency, in fact, has solicited over \$10 million in a 6-year period of time to upgrade the conditions of Indian people. We found out that no more than \$36,000 in any given year was ever delivered to the Indian people.

So, of course, when we challenged the Minnesota Council of Churches, we demanded that they establish an all-Indian board or at least 75-percent-controlled Indian board. We demanded that the chairperson of that particular board be Indian forever. And we demand that the Department of Indian Work be changed from non-Indian Department to Indian Department.

After fulfilling those commitments by the Minnesota Council of Churches, we then utilize that agency to advocate for low-income moderate housing for Indian people. In 1972, 1973, we were finally successful, along with model cities, the Minnesota Council of Churches, the Catholic Archdiocese demand such a program. It was called the 236 program for low-income houses.

We built that program. It was supposed to house 65 percent Indians. But within a very short period of time, we found out that the Office of Economic Opportunity guidelines actually discriminate against Indian people. It was suppose to house at least 65 percent of our community. It was supposed to be Indian. However, within one year after the project was completed and the Indian people began to move in there, we found that the population had changed from 65 percent Indian to 35 and as high as 40 percent black.

We had no control over the program. In fact, in March of 1975, Housing and Urban Development, only after I think it was a little over one year of operation, the Housing and Urban Development stepped



in, and there had been one mortgage payment made, and they threatened to foreclose on the program itself.

In March 1975, what was formally known as the Southside Low-Income Housing Board of Directors, which was supposed to be majority Indian, had met with HUD officials. HUD officials told them on that night that they were going to foreclose on the project. They were \$150,000 in debt and they demanded the mortgage payment be made.

However, the Indian community got an opportunity to select another sponsor that night. They folded—the old board dispersed and folded. But before they did that, they selected the American Indian Movement over the Minnesota Council of Churches and Department of Indian Work to take full sponsorship of that program to work out some type of solution for the Housing and Urban Development.

Today we are still operating. It's now called Little Earth of United Tribes. It's a \$4.5 million housing complex in the city of Minneapolis, 212 units. It is the only surviving 236 program in the Nation today. It is the only one that hasn't been foreclosed on by Housing and Urban Development. It is under the total sponsorship of the national office of the American Indian Movement. And I serve as the sponsor of a seven-member board that is designed to work out some type of agreement with the Housing and Urban Development.

Today we have also located in that area one of the first national Indian health programs for the urban Indians. We've established dental clinics, day care programs, preschool programs, and many other programs to meet the specific needs of our own community.

MR. SCHWARTZ. You mentioned that the \$4.5 million in this case comes from the Federal Government, the Department of Housing and Urban Development. Were they particularly helpful in your establishment of sponsorship of this project?

MR. BELLECOURT. Well, I think they attempted to work out a work-out agreement which we are in the process of doing now. And we received section 8 funding. The whole area itself is under subsidized rent. However, I believe that the only reason why we do get cooperation from Housing and Urban Development today is we feel that they're in a position where they cannot close the project down.

It's 96 percent Indian today. Even with that housing program established there, of course, it hasn't changed the housing situation of Native people at all in that area. We have well over 600 Indian families on the waiting list to get into that project.

MR. SCHWARTZ. Another area that you mentioned, Mr. Bellecourt, was the court system. And I'd like you to briefly describe, if you would, the problems that Indian people were facing with respect to the court system.

MR. BELLECOURT. The court system, of course, in the city of Minneapolis or the State of Minnesota hasn't changed in the past 10 years, since the formation of the American Indian Movement. However, we took the initiative to change some of the conditions that face our Indian people.

People will remember, shortly after the formation of the American Indian Movement, we started an all-Indian citizen patrol, which was designed to monitor the police departments in our community, designed to bring about non-Indian support groups to represent Native people within the court system where we seem to end up with public defenders whenever we try to put up a defense for ourselves.

Through establishing the citizen patrol, we were able to design a program that is operating in the city of Minneapolis today called the Legal Rights Center. This program is designed and is governed by the Indian and black community which have the majority of the board of directors on the board.

In the State of Minnesota, we make up less than 1 percent of the total population. But 20 percent of the population within the institutions is Indian. In the State of Minnesota, one out of every four Indian children is under some type of foster care or protective custody. Even though we make up less than 1 percent of the population, 20 percent of the population in these institutions are Indian. Ten percent of the population is Indian and we do 20 percent of all the time served.

So we initiated a program to deal with the public defenders and the lack of services provided for the Indian people. And it is quite a successful program because, along with providing legal services, of course, we provide many other programs that benefit our Native people, and particularly in the juvenile and youth area.

MR. SCHWARTZ. Thank you. Mr. Means, I'd like to turn to the area in which you live on the Pine Ridge Reservation in South Dakota, in the State of South Dakota, and I'd like to get your testimony on the civil rights problems that Indians of your tribe and in South Dakota are facing at this point in time.

MR. MEANS. Well, at this time, we see a move by the United States Government to develop energy resources within what is called the Fort Laramie treaty area, being the treaty of 1868 which was proclaimed by the President and ratified by Congress.

This energy development is in direct violation of this treaty. And it also has some very serious environmental effects on the people in our area.

What we see the government doing, along with these energy developments, the same time we feel that the United States Government represents the American Indian Movement as a direct threat to achieving its corporate and illegal goals of exploitation. For this reason, we have suffered from the direct attack of the government, especially through the FBI and the court systems of the Federal Government in the State of South Dakota.

My brother, Russell Means, has faced 37 felony indictments since 1973 which resulted in 12 separate court trials. He is presently incarcerated at the Sioux Falls Penitentiary on the charge of rioting.

I, myself, will be going to prison in another month or so from a conviction in the same incident. The State of South Dakota, it took them



17 months to answer my appeal. The trial court did not even take a look at the excessive use of force in the State of South Dakota, nor did they take a look at the right of the people to self-defense.

I am facing a 30-month sentence. In the case of Richard Marshall, which was recently heard last week in Rapid City in an attempt to gain a new trial, where we proved in that hearing how the FBI will stop at nothing to achieve its intimidation in order to prosecute Indian people.

MR. SCHWARTZ. Mr. Means, in our hearing in South Dakota in July of last year, we took some testimony from Indians, as well from the FBI, that indicated that the patrolling of the FBI was somewhat different on the Pine Ridge Reservation than it was in the rest of South Dakota; and there were roving patrols of FBI agents, rather than those just answering particular complaints, as was the system used in other reservations.

We have some testimony on what was going on then on the record. I would like to ask you in the intervening period, up until now, have the FBI patrolling procedures changed at all?

MR. MEANS. No. In fact, they're just as bad now as they were before you guys came. I would cite the Tuttle family in the district of Porcupine on Pine Ridge, where the FBI came to question one of the young men who was not at the house at the particular time. As soon as the door was opened, they saw a bumper sticker and flag which signified the family's support of the American Indian Movement—as soon as the FBI agents saw that, they opened—they pushed the door open, stormed inside, and forced everybody to come outside. One young boy, 15 years old, was made to lie face down in the snow and handcuffed while they questioned other members of the family as to the whereabouts of the particular person they were looking for who wasn't there.

These kinds of things are common. The illegal entry, illegal arrest, the FBI will arrest people in order—you see the State of South Dakota does not have jurisdiction on the Pine Ridge Reservation. Nor does the State of Nebraska have any type of extradition agreement with the Oglala Sioux Tribe.

When a case comes up whereas Nebraska authorities claim or wish to serve a warrant, if it's not caught in time, they'll just go ahead and grab the person with the help of the tribal police. The other thing that happens is that the FBI will arrest a person on Pine Ridge, charge them with a fugitive warrant, take him throughout the city, and then drop a fugitive warrant, send them over to State authorities who then go through extradition proceedings.

They use the FBI to get away or get by the jurisdiction question.

MR. SCHWARTZ. Mr. Chino, I'd like to turn to the area of your reservation, Mescalero Apache in the Southwest. I'd like to ask you from the standpoint as the president of the tribe, to describe very briefly the economic development that the tribe has sought to undertake, and par-



ticularly with respect to problems that that economic development faces with respect to law enforcement.

MR. CHINO. Mr. Chairman, members of the Commission, I appreciate the opportunity to be here. Mr. Schwartz, if I may, I would just like to give some observations with regard to statements made by the first witnesses here this morning.

Number one, I think that Indians have been dealing with legal issues and matters of justice, but are dealing in matters that are foreign to them—totally foreign, something that was never a part of their system.

For instance, land ownership. Land ownership to them was based on the use of land, the utilization of resources. Then things changed. People who came to our shores say that the only way you can demonstrate ownership of land is you must have a piece of paper which represents title to land.

There is also another issue or another matter. The Indian concept of justice is exactly that. We didn't resort to any legal technicalities to understand what justice is. We didn't bother with technicalities. These are just some of the things that make it difficult for us today.

And I by no means believe that Indians are an impotent group. They're not. The only reason that they have not been heard is that they are not given a comparable access to the media—"Issues and Answers" or you take any national media to speak on some of the issues concerning them.

MR. SCHWARTZ. Mr. Chino, with respect to your next to the last comment about whether or not Indians are an impotent group, particularly politically I'm talking about—we had some discussion previously about the economic development of Mescalero Apache Reservation, which I'd like you to briefly describe.

The point that was raised in our earlier discussions had to do with the ability of the Apache community to control the influx of non-Indians who were seeking to use the resort facilities which you had developed. And I would like you to describe that particular aspect of the problem as we had touched on it before.

MR. CHINO. Yes. We as Apache people, we are no different than the group represented by Mr. Means or Mr. Bellecourt. I think we as Indian people share mutual concerns. These concerns are better housing for our people—safe, adequate housing. We want adequate education for our people. We want adequate health for our people. We want adequate employment for our people. And I guess this, in substance, represents our efforts on the Mescalero Apache Reservation.

Of course, you arrived at a well-balanced social and economic development, and to take into consideration all of these differences. In fact, we had gone so far to have the public housing laws amended. After the rest of the country had enjoyed 30 years of public housing, we had to amend the law to make the Indian people and Indian tribes eligible for housing programs.

Even in that sense, we are far behind in participating in housing programs. So we went into housing programs because housing, I think, is vitally important to the development of our people, particularly for the young.

MR. SCHWARTZ. Has your tribe also gotten into the development of the tourist industry on the reservations?

MR. CHINO. Yes, we have gone into tourism, outdoor recreation, skiing industry. We are heavily involved in the Mountain Gods resort operation.

MR. SCHWARTZ. Now, does that end of the Mountain Gods bring in an Indian and non-Indian mixture of people, or just for the Indian community? Or how does it operate?

MR. CHINO. Oh, I think that our efforts are pretty much a regional program. I think not only on behalf of our people, but on behalf of other people as well. It has created, in one sense of the word, a problem for us by virtue of the *Oliphant* decision. I think that the *Oliphant* decision not only has created a problem for Mescalero, but I think it has created a problem for all Indian tribes, created a vacuum. That, to me, I think, represents something that is at least or maybe it will take the courts to determine, but I believe it has created a situation that is unconstitutional. I think it is discriminatory.

MR. SCHWARTZ. From a practical standpoint now, in the operation of that resort when non-Indians are coming into your community, what are the practical impacts of what the Supreme Court has decided in *Oliphant* and, in fact, the basis for the case that the tribe has brought against the United States Government?

MR. CHINO. On my particular reservation, we have a residential district that's maybe 12 miles long, major highway running through the community. The *Oliphant* decision, I think, precludes us from exercising any enforcement over people who endanger the lives of our people.

Mr. Schwartz. Thank you. Ms. Namias, I'd like to ask you to briefly describe what is that you do and particularly, since we're running short of time, to get into the interaction you've had with tribal people in the State of Maine.

MS. NAMIAS. My position with the American Friends Service Committee is to serve as a communications-liaison person with the staff programs of the Native American affairs around the country. Particularly for this hearing, I just recently returned from a field visit to Maine, where I visited with the three reservations up there, people from the three reservations there, and also two off-reservations centered in the State, representing the Micmac and Malecite population. I informed them of these hearings. And as I did, we just had a conversation on how the Native American people in Maine are being discriminated against. So the insights that the reservation people gave me is the fact that they can't get mortgages on their homes. They feel they are being discriminated against as veterans because they can't get GI



loans to finance their homes because of the question of ownership of the land.

The relations with non-Indian people in the neighboring communities at this point, especially with the land claims now—so much in the headlines—it's just at an all-time low. I've heard stories about non-Indian people riding through the reservations, and not at all adhering to the speed limit, and reservation police being totally not capable of stopping this. It's a danger to the residents of the reservations.

Relations with the neighboring community are not good at all. The Service Committee program in Maine, the focus of it now is to deal with the non-Indian public and try to bring out in the open some of the myths and the stereotypes and some of the hostilities, underlying hostilities, that are actually causing these sorts of things.

The Service Committee has a filmstrip and a slide show that they put together. And they go around to different communities and they show it. And afterwards, they encourage discussion groups. And people ask questions. They still ask questions like: Do Indians live in teepees? Are Indians special citizens? Why do we have to adhere to treaties? Indians have assimilated, so therefore, they're not Indians anymore. On the grade school level and the Title VI programs, one of the instructors was asked: are Indians born with feathers? And this comment was from a young child in grade school. But it just shows you at what point, you know, children, perceive those typical Indian stereotypes.

MR. SCHWARTZ. Has the land claims case that was brought on behalf of the Passamaquoddy-Penobscot tribes in Maine have an effect in the non-Indian community, a reactive effect to those people in other settings beyond land claims or to other tribes that might exist in the State of Maine as well?

MS. NAMIAS. They serve a Micmac and Malecite operation basically. The Micmac and Malecites make up approximately half the Native American population in the State of Maine. The land claims case has, in effect, bunched all of the Indian people in the State of Maine together. And the nonreservation Indian people are finding that their communications with the general assistance level on the different towns has been affected by the land claims.

There is prejudice against the Micmac and Malecites because of the land claims. The Micmac and Malecites are different tribal groups; they won't receive any money from the Federal Government according to the land claims. They have been severely affected by this.

I have an article here from an Indian publication in the State of Maine. It's June of 1978. It's called the *Wabanake Alliance*. And in it, it tells how an Indian woman was discriminated against because of the fact that she was Indian. She was neither Penobscot nor Passamaquoddy. She was told that in order to receive assistance at the local level, she would have to pay back a certain portion of it.



The article clearly states—Mr. Thomas McCarrie, he's the director of the Central Maine Indian Organization—that that is against the State of Maine law, that members of non-federally recognized tribes shall be reimbursed by the Department of Human Services; and also that the State or the local public assistance office shall be reimbursed as well.

This provision that she agreed to stopped her from receiving assistance the second time when she went to apply because she was not able to pay back part of the money the first time. That forced her to go into different areas of her budget, such as rent and food and clothing for the children. She was forced to ask friends to take in her children while she worked.

During this part of it, the State of Maine came in attempted to place her children in a foster home. And they did place her children in a foster home for a short period. And the Central Maine Indian Organization wasn't notified until it was too late. I think that underscores another area which should be focused on, is the fact that the State government within Maine does not have any communication with either the Central Maine Indian Organization or the association of Aroostook Indians, which is up north.

I think the State's alienation towards Indian people is very apparent in the fact that Governor Brennan, the newly-elected Governor in the State of Maine, has just put forth his biannual budget for the Department of Indian Affairs, which has been an ongoing entity since 1966.

Now, the '79 budget will remain the same as the previous year, which is approximately \$1.7 million, which will be given to Indian residents within the State of Maine to cover areas such as general assistance and housing, education, and a new migratory workers program which is very much needed because of the constant crossing of the border of the Micmac and Malecite population between the United States and Canada.

The 1980 budget, which if approved by the State legislature will go into effect as of July 1, 1980, has as its line item for the Department of Indian Affairs, zero. Now the Governor's rationalization is that by this time, Federal monies will be coming into the State of Maine. And the services covered under the Department of Indian Affairs will be picked up by the Federal Government support.

The Micmac and Malecites won't have access to those monies anyway so they feel that they are heavily being discriminated against in that area.

MR. SCHWARTZ. Thank you, Ms. Namias. I have no further questions.

CHAIRMAN FLEMMING. Commissioner Freeman.

COMMISSIONER FREEMAN. Mr. Bellecourt, I'd like to pursue a statement which you made concerning the housing development in your city. In outlining your complaint, you stated that the Indians were discriminated against in occupancy. That the project was 40 percent

black. And then, there was a change in sponsorship and a change in board, and now the occupancy is 96 percent Indian.

I would like to know if you will describe the procedures that were taken to change that percentage and what happened to the blacks who were tenants?

MR. BELLECOURT. In March of 1975, I was in Boston, Massachusetts, and I received a phone call from Dennis Banks, notifying myself that we had inherited a \$4.5 million housing program, where there is no law enforcement assistance or anything taking place there.

What happened is the black community, of course, who have the same, like type of problems, immediately started moving into the housing area. And even though it caused a lot of conflict, there was no help either for the black or Indian community as far as leadership.

Law enforcement agencies, of course, that came into the project area only took names and addresses and conducted no type of investigation. The housing originally called for 65 percent Indian occupancy. This would replace the housing that the Indian people, that was being town down.

Today, of course, we have a seven-member Indian board, which I have been appointed by the national office of the American Indian Movement. And it is well known to the black community, the Chicano community, the poor white community. In Minneapolis there's an Indian housing corporation called Little Urban United Tribe, Southside Low-Income Housing Program.

The program within the project itself is designed to meet the cultural needs of that particular community. And like I say, they didn't have any mortgage payments collected in a year and a half after the project was completed.

There are several other housing projects in the Twin City area that were designed for low-income people. So we were, of course, placed in a position where we had to take a very hard stand as far as rent collection, mortgage payments being made, and work out some type of work-out agreement with the Housing and Urban Development.

We face strikes for low-income housing programs. People want us to take time off, etc. When they organized strikes against us, of course we're in no position to meet those demands. And the people that went on strike are still on strike today.

We operate the housing program, unemployment. We got rid of the Minnesota Rangers, the Minneapolis Police Department to an all-Indian security patrol. The only way I could answer that question is a lot of people know—not only black people, but the Indian community itself, and the non-Indian people who have been using the project area—the majority of them have been evicted.

We had a situation where there was no maintenance being done, there was no security, mismanagement, people refuse to pay their rent, will not pay their rent until those conditions are changed. With the initiative to change those conditions, of course, we got a subsidized low-

income housing program under section 8 for the Indian community in the Minneapolis area. The demand is so tremendous in the area of housing, we have over 600 families on the waiting list right now.

COMMISSIONER FREEMAN. Thank you.

CHAIRMAN FLEMMING. Commissioner Horn?

VICE CHAIRMAN HORN. Let me ask Counsel, what are your plans in terms of inserting the various relevant legal decisions in the hearing record? Are you going to summarize them; are you going to put the *Oliphant* decision in toto or what?

MR. SCHWARTZ. There have been many references made to a number of court cases. I think that would be—unless you had a preference—that would be something that we would decide as we went along. Some of them have been inserted. I don't believe the whole *Oliphant* decision has been.

VICE CHAIRMAN HORN. Well, we haven't inserted them yet in this hearing, have we?

MR. SCHWARTZ. No, we haven't inserted it yet.

VICE CHAIRMAN HORN. I would like exhibit 1 then to be a summary or the actual decision of the relevant cases that affect this hearing, so we have a point of reference. Then, the only other—

CHAIRMAN FLEMMING. Without objection, that will be done.

VICE CHAIRMAN HORN. The other request I'd make, Mr. Chairman, is that following Mr. Means' testimony, that the example he gave of the FBI search, etc., if that can be charitably described as a search, be referred to the FBI. And any response from the FBI be placed in the record at the conclusion of his testimony where the incident was referred to.

CHAIRMAN FLEMMING. Without objection, that will be done. Commissioner Ruiz?

COMMISSIONER RUIZ. A discussion was had with Mr. Philip Deloria, a prior witness, relative to the need for fluidity of options in carrying on discussions with the Federal Government. That this need for even inconsistent approaches has been impelled by the inconsistent positions taken by the Federal Government in the past, which the media sometimes has referred to as the forked-tongue position.

I understand that you, Mr. Means, have been interested in seeking international support from the United Nations International Indian Council. Is that correct?

MR. MEANS. Yes.

COMMISSIONER RUIZ. What is the United National International Indian Council?

MR. MEANS. Well, you have the title a little wrong. It's the International Indian Treaty Council, which is a nongovernmental organization with consultative status with the U.N.

COMMISSIONER RUIZ. With what kind of status with the U.S.?

MR. MEANS. With the U.N.—consultative status, category two, which gives us a means to present documentation to different organs of the



United Nations. I just returned from the Commission on Human Rights hearings that were held in Geneva in February 12 through March 16.

It's sort of ironic that the last two times that we've been in Geneva, the first time the State of South Dakota came down on my brother; as soon as I get back, I get hit with a Supreme Court decision on my case. Attack on the leadership is a consistent attack.

COMMISSIONER RUIZ. I notice that you're looking at some book. Does that make reference to what happened in Geneva, or is that some sort of an agenda?

MR. MEANS. This is the *Third International Indian Treaty Conference*, the book that's from that conference. We also have a copy of the Geneva conference which was held in 1977 that we would also wish to submit.

COMMISSIONER RUIZ. May the matters referred to be submitted by identification number, Mr. Chairman?

CHAIRMAN FLEMMING. Without objection, that will be entered in the record at this point.

COMMISSIONER RUIZ. Now, it has been said that Indian tribes divested themselves of external sovereignty, the right to make treaties with other nations and foreign powers, in return for the protection of the United States. With relation to that statement, have you run into any difficulty with respect to matters of agenda where you visited Geneva?

MR. MEANS. No, we haven't—number one, because people in the international community basically do not have the same interests that the United States Government has, of course, in Indian lands.

COMMISSIONER RUIZ. Have you received any opposition from the United States Government with respect to that particular thought?

MR. MEANS. Well, no. The point I wanted to make is when the United States is confronted with the situation of Indian people in the United States, it is never able to answer the charges, but goes around the bush and makes a campaign speech, an example being the testimony at the Commission on Human Rights.

COMMISSIONER RUIZ. Just one more question. I just wondered if the material that you made reference to, does it set forth the chairmanship, the structure, the process with relation to that council?

MR. MEANS. The International Indian Treaty Council?

COMMISSIONER RUIZ. Yes.

MR. MEANS. I don't think that this document does. But we can get that documentation to you. This document is a report of the NGO conference.

COMMISSIONER RUIZ. Would you produce the documents that you made reference to and have that placed next in evidence as an exhibit?

CHAIRMAN FLEMMING. Without objection, that will be done. Commissioner Saltzman?

COMMISSIONER SALTZMAN. If each of you could answer briefly. You indicated the Federal agencies in which there is conflict between the

Indian nation and the Federal agencies: The FBI, securing of G.I. mortgages, etc. Do you—specify, to your knowledge, what specific agencies and what certain Federal agencies you find severe conflict developing on a continuing basis.

MR. BELLECOURT. I would like to mention a couple of them. The Federal Bureau of Investigation in July 7 of 1976, sworn testimony of the Federal Bureau of Investigation Director, Clarence Kelly, that took place in Cedar Rapids, Iowa. He was questioned extensively by William Kuntsler, one of our attorneys, in relationship to the type of harassment which leadership and the movement go through by the FBI.

We are aware, of course, that the Federal Bureau of Investigation has just concluded a 3-year investigation into the American Indian Movement, of which, not only leadership of the movement and chapters of the movement around the country, the phones were tapped and under surveillance—the National Tribal Chairmen's Association, National Council of American Indians, National Council of Churches, Methodists—every organization that supported us was under some sort of surveillance by the Federal Bureau of Investigation.

In fact, right here in Washington, D.C., today they have over 80 volumes of information that was gathered illegally against the American Indian Movement, numbering over 80,000 pieces of paper. However, we are unable to get—even though we should be under the Freedom of Information Act—we're unable to get that information turned over to us.

However, Clarence Kelly, after being questioned by William Kuntsler about this investigation, finally asked him if he felt that this organization was a subversive organization against the government.

Clarence Kelly's direct testimony on that was: "It is my very definite knowledge that the American Indian Movement, which has fine goals, has many fine people, and has a general consideration of what needs to be done, something that is worthwhile, and it is not tabbed by us as an un-American, subversive, or otherwise objectionable organization."

Now, in September of 1976, that same year, Senator James Eastland conducted a subcommittee to investigate the administration of the Internal Security Act and other internal security laws. He held a hearing on the revolutionary activities within the United States, the American Indian Movement. He did not call Clarence Kelly as one of his principal witnesses, even though he was located right here in Washington, D.C., and it is my understanding that Congress and the Senate confirmed that the director of the FBI did not utilize the testimony.

In fact, the only witness that they had was a man by the name of Douglas Durham. The only person who sat on that commission that day to hear the report was James Eastland and his counsel. After taking this information that they got from this informant, a man wired evidence here, papers here, that investigation that we've taken, and I

can prove that, not only was he lying to this Judiciary Committee, but he in fact—when the investigation had concluded on him, he was under investigation himself for murdering two of his wives.

This was the only testimony that was taken by this Judiciary Committee in the United States Senate, 94th Congress. Then this particular report was put out which linked us, of course, to Red China—and they don't say "Cuba." He says, "Castro Cuba and Russia." Every Communist nation in the world was supposed to be joining us at Wounded Knee.

We accomplished something that Kissinger and the Presidents for the last 30, 40 years have been unable to accomplish, bringing all of these Communist world powers together at Wounded Knee. And utilizing this report, not even talking to the FBI director, they put this out on a massive media campaign to discredit the American Indian Movement.

And we are feeling those effects today in many, many different areas, because within this package, within this hearing, this testimony, they maintain that the survival school system that is operated by the American Indian Movement today, funded by the Office of Economic Opportunity, and look at today's national demonstration-type of program—very beneficial to our community.

They testify in this statement, in this book that was given out to the media, utilized around the world, that these are nothing but guerrilla warfare camps where children are being trained in guerrilla warfare tactics and how to hate whitey, and eventually to overthrow the Federal Government.

COMMISSIONER SALTZMAN. Mr. Bellecourt, because of the time running out, I would appreciate other indications from you and the rest of the panel, of additional Federal agencies where you find conflict arising between the Indian community and Federal agencies.

CHAIRMAN FLEMMING. Could I ask the witnesses if they would simply just identify the other agencies at this point because our time for this panel has expired, and I do want to allow enough time to get this testimony into the record. So if you would just identify any other agencies where you've sensed this, or experienced the conflict that Commissioner Saltzman is talking about.

MR. BELLECOURT. I don't think we're going to have time to identify all of the agencies. But we do have documentation, case histories, and briefs that have been filed to which we can prove our story. I am director of an effort called the Federation of Native-Controlled Survival Schools. We have 16 schools located both on reservations and off reservations.

In 1972, following the occupation of the Bureau of Indian Affairs here in Washington, D.C., these charges came up, and they even manipulated the National Tribal Chairmen's Association through Robert Robinson, the National Council on Indian Opportunity, to put out charges that the American Indian Movement—and I think Mr.



Chino, Roger Jordain, and several other people have made these charges under the direction of the Vice President's desk—that the American Indian Movement was ripping off over \$400,000 a year in Federal education funds for their military efforts at Wounded Knee and the Trail of Broken Treaties.

We successfully sued the Nixon administration all the way down to the local school board in Minneapolis. And at the conclusion of the testimony, when they found out that no monies were missing, and the fact that they did audits and everything was in shape, they asked for a court order to bring three non-Indian clinical psychologists into our school and test our children.

After 2 years of testing, they found out that it was the introduction of Indian culture, the tradition, the Indian value system, the bilingual culture, that our program was running anywhere from one-half grade to one and one-half grade levels higher than their white public school counterpart.

The landmark decision was by Judge Miles' court in Minneapolis. Shortly after that, we filed with the Internal Revenue Service for tax-exempt status. And just recently as a few months ago, we received a letter from IRS stating that they were in default for the past 18 months. And they utilized United States civil rights guidelines, they utilized the civil rights guidelines against us not to grant us tax-exempt status, claiming that we were discriminating against the overall general public because we are an all-Indian board, we have Indian schools that are taking care of the needs of Indian children, and the program was managed by Indian people. Because we're using Federal funds, of course, they use the whole civil rights guidelines, etc.

COMMISSIONER SALTZMAN. IRS has not granted your exemption?

MR. BELLECOURT. We have been granted tax-exempt status. They admitted they were 18 months in default. We do have a suit against them at this time.

COMMISSIONER SALTZMAN. The other agencies, if you would merely list them, additional agencies where you find areas of conflict with Indians, Mr. Means?

MR. SCHWARTZ. Excuse me. Before we go to Mr. Means, there were some documents that were referred to by Mr. Bellecourt which I would like to have for the record please.

CHAIRMAN FLEMMING. Those documents that you referred to, if you will make them available to us and we will enter them into the record at this particular point.

MR. BELLECOURT. I have a legal memorandum on questions associated with the support of the Indian alternative schools. I have the findings of fact and conclusions of law in Judge Miles' court in relationship to the outcome of it. I have information on the Federation of Indian-Controlled Survival Schools; the hearing report of the Minnesota Citizens Review Commission; the FBI Citizens Review Commission; the FBI reports that refer to the occupation of the Bureau of In-

dian Affairs. We have the solution paper that was published, and how media handled that particular case.

CHAIRMAN FLEMMING. Thank you very much.

MR. MEANS. We also would like to reserve the right to submit further documentation and informative material. But I would like to outline some of the agencies in my particular area. Of course, you mentioned the FBI, and the State law enforcement agencies, another agency that we have had to deal with continual conflict arises with those people.

The State of South Dakota has recently reinstated the death penalty in the court systems, which is a critical situation, and tools of the Federal Government are the Nuclear Regulatory Commission, the Environmental Protection Agency, the Forest Service—all of these agencies dealing with natural resources.

The legislature is attempting to legislate us out of existence. The 11 bureaus that were in Congress last year, they were back to 22 pieces of legislation. I would like to refer you to the Uranium Milltailing Radiation Control Act of 1978, which outlines how the Federal Government can rip off Indian land.

Another agency that needs to be mentioned is the Bureau of Prisons, because of their use of barbaric tactics and outright torture of Indian prisoners. And I would like to here today outline Ron Tublo's case. He is being subject to prolypson, thorazine, and valium, and is having severe physical affects, presently incarcerated at Leavenworth, Kansas. This is not an isolated case.

Getting back to this report—I wanted to throw that in before I forgot it—this report again outlines the processes for ripping off Indian land. And where environmental questions arise, the act provides for stabilization, disposal, and control in a safe and environmentally sound manner, of such tailings in order to prevent or minimize greater confusion.

All of the legislation, all of the procedures of the Federal Government, governmental agencies, all of their guidelines—people are not considered. Human beings are not considered. Corporate structure and the corporate gains is all that matters.

The treaty question has got to be settled before—there is going to be continual conflict in my area for sure, because people are not going to stand by and allow the destruction, not only of our land, but the destruction of our people, the destruction—the genocide of our children, because the physical affects of this energy development is going to bring deformed babies.

It has already been proven that the Government is involved in a massive sterilization program of Indian women. At least 24 percent of women of childbearing age, and this comes from the GAO report and Senator Abouresz's office—24 percent. The Federal Government is involved in genocide. They're calling our area, the Southwest Four Corners area, Northern Cheyenne, where this energy development is taking place, they're calling it the sacrifice area.

We're not going to stand by and let ourselves be sacrificed. The treaty question has got to be answered.

VICE CHAIRMAN HORN. Mr. Chairman, I ask that the comments on the case referred to at Leavenworth be referred to the Federal Bureau of Prisons, the answer of the Bureau to be inserted at that point in the record. In terms of the 24 percent reference, I would like the portions of the GAO report cited, and any other relevant data from the agencies involved also placed at that point in the record.

CHAIRMAN FLEMMING. Without objection, that will be done.

MR. MEANS. I would like to submit a booklet which is *The Women of All Red Nations*, which outlines some of these statistics and gives the information as to the GAO report and other issues.

CHAIRMAN FLEMMING. That will be received. And without objection, will be entered into the record at this point. Mr. Chino?

MR. CHINO. Mr. Chairman, I would like to have an opportunity at a later date to submit at least my observation of the Justice Department where, exercising justice, I think we're becoming more concerned about the dollar sign than the fruits of justice; and also, the fact that in courts, I think, are becoming an instrument of the tyranny of the majority. And I would like to submit this material at a later date.

CHAIRMAN FLEMMING. We would be very happy to have you do that. Ms. Namias, do you care to comment on Commissioner Saltzman's question?

MS. NAMIAS. I would just like to add one more Federal agency to the list, and that would be the Veterans Administration. They are refusing the Indian people who served in the Armed Services home improvement loans or mortgages because of the question of ownership of the land that the house is going to be built on.

So you have Indian men and women, in some cases, who have gone off and served in the military and served in Vietnam and being denied loans, GI loans that are within reach of any other American citizen.

CHAIRMAN FLEMMING. May I express appreciation to all of the members of the panel for being here and providing us with this testimony. Thank you very much.

MR. MEANS. Excuse me. I would just like to call your attention to another document. Maybe I could give it to her.

CHAIRMAN FLEMMING. Yes. Counsel will call the next witnesses.

MR. SCHWARTZ. The next witnesses are Olive Beasley, Harriet Skye, William Walsh, and William Hensley. Would those people please come forward?

[William Walsh, Harriet Skye, William Hensley, and Olive Beasley were sworn.]



COMMITTEE; WILLIAM HENSLEY, CHAIR, ALASKA ADVISORY COMMITTEE;  
AND OLIVE BEASLEY, MEMBER, MICHIGAN ADVISORY COMMITTEE

MR. SCHWARTZ. Would you each please state your name, address, occupation, and the State Advisory Committee [to the U.S. Commission on Civil Rights] that you represent for the record please, starting with Mr. Walsh?

MR. WALSH. Bill Walsh from Hill City, South Dakota. I serve on the South Dakota State Advisory Committee.

MS. SKYE. My name is Harriett Skye. I'm the Chairman of the North Dakota State Advisory Committee. I am also executive director of the North Dakota Association for Native Americans.

MR. SCHWARTZ. Would each please speak into the microphone as you do this so we can hear you.

CHAIRMAN FLEMMING. That is not a microphone, the one which you have in front of you.

MR. SCHWARTZ. Please use the two end microphones.

CHAIRMAN FLEMMING. Just the two end mikes.

MR. HENSLEY. I am William Hensley. I live at 2432 Lusac Drive in Anchorage, Alaska, and I am Chairman of the Alaska State Advisory Committee.

MS. BEASLEY. My name is Olive Beasley. I live at 806 Belmont, Flint, Michigan. I serve on the Michigan State Advisory Committee. And I guess I'm really wearing two hats today; that is, the Michigan Department of Civil Rights and the State Advisory Committee in the information that I'd like to share with the Commission.

MR. SCHWARTZ. Ms. Beasley, the Michigan State Advisory Committee, I believe, in 1974 published an extensive report concerning housing conditions with respect to their impact on the Chippewa people of Sault Ste. Marie.

Very briefly, since we are behind time, I would like you to just summarize some of the detail in that report, and then also update the Commission on the conditions that have occurred, or the changes that have occurred in that problem since the time the report was written.

MS. BEASLEY. Yes. The Michigan State Advisory Committee did work over approximately a 2-year period. This came about as our project to monitor the compliance of civil rights provisions of the community development block grant.

We were asked to come to Sault Ste. Marie. We found there is a community generally identified as the Marshak area. The name comes from two adjoining streets. It is a concentration of American Indian population that has occupied that land for many years.

The city of Sault Ste. Marie has received numerous grants, both from HUD; ETA, DRS, about every other Federal funding agency, always citing the need in the Marshak area. There were no sewers, no water, other absolutely deplorable conditions there—no indoor plumbing, no recreational facilities. It was a highly diseased area because of construction of sewers in the other parts of the city and the way the

topography there is that all of the sewage from other sections flush down through that area. And children of Indian families there got terrible diseases from playing in infected ditches, which was the only place they had to play.

The staff from the Regional Office and some members of the Committee, including myself, went to the city and had a number of preliminary interviews with various citizens in the area, both Indian and non-Indian with certain public officials.

And there we determined to go in and hold a kind of hearing the State Advisory Committees are authorized by the Commission to hold. We did hold that hearing and took extensive testimony and published the report, which was submitted to the Commission. And they referred to the appropriate agencies those recommendations that are within your prerogative to do, and we did refer through SAC to some local agencies within Michigan.

Those conditions in regard to sewers and waters have been pretty much resolved. There are still many other problems up there that they have and will continue to have, I think, for a number of years.

MR. SCHWARTZ. Are you familiar with the involvement of the Federal Government or any agencies of the Federal Government in attempting to solve some of the problems that were brought out by the report issued by the State Advisory Committee?

MS. BEASLEY. The recommendations were referred to HUD, they were referred to ORS; they referred to EDA. Those are the ones that I distinctly remember. They have all conducted some kind of investigation. HUD just issued their final findings in regard to their compliance review there.

And I was assuming that copies of that—because I received this from the Midwest Regional Office—that you have them in your possession.

MR. SCHWARTZ. Has the State Advisory Committee become aware of any other civil rights problems, housing or other areas, perhaps elsewhere in the State of Michigan that impact particularly on American Indians?

MS. BEASLEY. Oh, yes. Even in the Sault, both the State Advisory Committee and the Michigan Department of Civil Rights have been involved with the city in regards to affirmative action programs, employment. Sault Ste. Marie, as you may be aware, because of the closing of Kenchila Air Force Base, and even prior to that, it was a very economically depressed area. But despite that, we felt that the city could have done more in terms of affirmative action.

MR. SCHWARTZ. One issue that you brought up when we had discussed the involvement of the State Advisory Committee approximately a week ago that you would check into was the question of sterilization of American Indian women, involuntary sterilization. You felt that there might be some particular problem in Michigan State with respect to that. I was wondering if you had any more information on that at this time?

MS. BEASLEY. No. That issue arose in Traverse City, Michigan, and it was one of a number of complaints which the staff of the Midwestern Regional Office looked into. It was not a SAC project as such. The Committee did hold two meetings there and did talk to the people.

There were allegations that Indian women and others were being coerced by caseworkers, social service caseworkers, into agreeing to sterilization under threat of not being eligible for certain welfare assistance.

We could not document it. The Department of Social Services says that this is contrary to their rules and regulations. But the complainants in Traverse City then would not give us formal complaints, because they said they were afraid of retaliation against them if they came forward and identified themselves as having had this happen. So we couldn't get the evidence.

MR. SCHWARTZ. Thank you, Ms. Beasley. Ms. Skye, the North Dakota State Advisory Committee recently issued a report concerning law enforcement conditions within the State. I wonder if you would very briefly describe that to the Commission—any further developments that have occurred since that report has been issued in the law enforcement area.

MS. SKYE. Almost from the date that this report was released on September 14 of last year, it has really had an impact in the State, and particularly in the city of Bismarck. There was some disagreement with the Executive Director of LEAA that they were in compliance.

Oliver Thomas, who is the Executive Director of LEAA, wrote a letter—I have it all here—stating that he was not in arrears. Dr. Shirley Hill Witt answered that letter saying that he was. The various law enforcement agencies have never, prior to the study, had anyone ever asking them any questions.

In February there was an article in the *Civil Rights Digest* that said that the Native American justice issues report had recommended that all LEAA funds be pulled out of the North Dakota State Highway Patrol, Bismarck Police Department, and the Burley County Sheriff's Office.

This particular little article here was picked up by one of the reporters from the *Bismarck Tribune* last week. And that made front-page news. Since then, I've been bombarded by telephone calls from the police department and the North Dakota State Highway Patrol saying that they are in compliance. I don't believe that they are.

I don't believe that any of the State agencies in North Dakota are in compliance.

MR. SCHWARTZ. You also mentioned when we prepared for this hearing that a natural resources issue that has been brought up in the previous panel is also an issue in North Dakota. Could you explain that to the Commission?



MS. SKYE. Well, I became involved in this issue quite by accident. In 1975 there was a Fort Union coal conference which was being held in Bismarck and sponsored by the North Dakota Legislative Council. I was invited out to dinner by a girlfriend of mine who is a Senator from Yellow Stone County, Montana.

She was very shocked and very surprised that I didn't know that the conference was going on. So I went up the next day and found that there was only one Indian there. And this Indian was Barney Logner and he was representing Governor Kneip of South Dakota. I have the proceedings here. That conference consisted of the State legislators from Montana, North Dakota, South Dakota, and Wyoming. It was held October 13 through 15 in 1975 in Bismarck.

It was sponsored by the National Science Foundation, which is an intergovernmental science and public technology, and the North Dakota Legislative Council. There was not one Indian representative at this conference.

MR. SCHWARTZ. Are there significant natural resources on the Indian reservations in North Dakota?

MS. SKYE. Yes. I would also like to add that just recently we had a conference, the United Tribes Board of Directors, which is the controlling board for the United Tribes Educational Technical Center at Bismarck, met with two—a representative and a senator from the legislative body of North Dakota.

There were comments made by tribal people at that meeting on tribal leadership, that they have never been invited in the last 18 years to any conference, energy conference. And if they were, it was, you know, they found out about it after the fact.

MR. SCHWARTZ. Mr. Chairman, I'd like that document on the Fort Union coal conference to be submitted at this point in the record.

CHAIRMAN FLEMMING. Without objection, that will be done.

MR. SCHWARTZ. Mr. Walsh, the State Advisory Committee in South Dakota I know has been particularly active in the law enforcement area, and I understand there are also some recent civil rights problems with respect to voter participation among American Indians in South Dakota that you're familiar with, and I'd like you to briefly describe those to the Commission.

MR. WALSH. Well, with regard to the latter, Marvin, that voting registration bill that came up during the legislative session was gutted on the last day. I would hope to think that several of us involved in the area of civil rights had something to do with that, because it was basically a civil rights question.

What they attempted to do was to allow only for a voter registration to take place through the county auditor's office. And there was enough smoke and fire and general raising hell about that issue, that we managed to get it stopped.

MR. SCHWARTZ. Could you explain what the impact doing that would be on Indian reservations?

MR. WALSH. First of all, a great number of Indian people would not be registered. One of the ways in which we can register Indian people is by a notary public going out and registering those folks.

Of course, the other impact of that would be the fact that a great many Indian people would not serve on juries, which is one of the big civil rights issues in the State of South Dakota—the fact that Indian people felt that they have not had fair trials because of the lack of Indian people serving on juries.

It became a big political issue in the gubernatorial election. So far as a week before that election the present governor, Governor-elect Janklow stated board of registration fraud on the reservations, and of course, in bringing that up, he managed to win by a sizable portion of the votes because of the anti-Indian sentiment.

So those are some of the things; what was your first question?

MR. SCHWARTZ. I think you've answered the question I asked. Mr. Hensley, in Alaska, are there voter participation problems with respect to the Native American population in that State?

MR. HENSLEY. Actually there is a substantial amount of voter participation, except for the problem that we have with language, and we do have a registration law that was passed about a dozen years ago. It's not too onerous though; the initial legislation that was proposed was terrible, but it wiped out participation.

But the problem we've got is, in a couple hundred villages or so, there just simply are a lot of people that do not speak English adequately or read and write. And I think the State has sought to attempt to exempt itself from the Voting Rights Act, so that at least, particularly with respect to the bilingual provisions, we think that there could be a substantial benefit to the people who vote, particularly with regard to the substantial numbers of propositions that go before the voters, including bond issues. We have a voter's pamphlet that's quite lengthy, but I think it's inadequate.

MR. SCHWARTZ. Have there been any studies done of the impact of the language barrier on voter participation among Alaskan Natives?

MR. HENSLEY. Not to my knowledge, not that I'm aware of.

MR. SCHWARTZ. What other civil rights areas are you aware of that impact particularly on Native Americans in Alaska, or that the State Advisory Committee in Alaska has been involved in?

MR. HENSLEY. The U.S. Civil Rights Commission frankly hasn't been up there. I mean, it's unfortunate. But I know that your budget is small and your staff is small. And until just a couple of years ago, we used to be serviced out of Los Angeles. And they did open up an office in Seattle.

And the first study that we're completing here relates to employment among Alaskan Natives, minorities, and women, particularly in State employment. The State of Alaska is a significant employer of people, and there was a study done on Alaskan Natives in Federal hire back about 10 years ago, which showed absolutely terrible practices

within the Federal establishment that were addressed to, with respect to, Natives and Federal hire. So this one is a little broader dealing both with Natives, other women, and minorities. And that study should be done shortly.

I think one of the most serious problems we've got, I think, relates to subsistence hunting and fishing. There is legislation pending now that would involve pretty much a confirmation of our rights to hunt and fish, but it's a rather complicated story. But it deals with about 100 million acres of Federal land that is to be designated into one category of use or another—wild and scenic rivers or natural forest.

We have—well, right now, about 75 percent or more of the food requirements of the Native people, particularly in the bush, comes from hunting and fishing. And unfortunately, the Federal Government is not particularly enthralled about the idea of allowing subsistence hunting and fishing, at least with respect to pressures from the environmental community.

So we've spent a good bit of the last couple of years in Washington, trying to ensure that the D-2 legislation has specific subsistence provisions that will allow Eskimo and Indian people to continue using those Federal lands that we've been using for a long time.

MR. SCHWARTZ. Has the controversy over the use of the land or the proper designation of the land had a spinoff or fallout effect in the civil rights area, traditional things?

MR. HENSLEY. Well, let's put it this way: there are a lot of changes going on up there as a result of the Native Claims Settlement Act of '71. There has not been any significant conveyance of land that was promised by the Congress. The Interior Department has pretty much dragged its feet in issuing of title to the 40 million acres that are supposed to go to villages and regions up there. In the meantime, there has been development of quite a significant conflict between the sports hunters and guides and people living on subsistence.

Of course, in the bush there are some non-Native subsistence users, but primarily Native people. So from that standpoint, there have been some real problems. The provision on subsistence is not a racial provision at this point. It's not viewed that way in the public mind up there because so many of the people live off of the land are in large part Native.

MR. SCHWARTZ. Thank you. I have no further questions at this time.

CHAIRMAN FLEMMING. On behalf of my colleagues, I want to express my appreciation to each one of you for coming here and participating in this hearing. The reports that you have issued in this area, the testimony that you've given here today illustrates how helpful the State Advisory Committees are to the Commission in the conduct of our work.

It seems to me that these reports and what you have said about what has happened since the reports have been issued also points out the fact that in a very real sense, within your States, you do help to serve as the conscience of your community in connection with these matters.



I was impressed by the fact there has been followup to the Michigan report, for example, and that some positive, constructive action has taken place. Obviously, there is opportunity for a great deal more to be done. But it is clear that your making that report public, your recommending to us that we in turn call attention to a situation as far as certain departments were concerned has led to some results.

I was very much impressed by what you had to say about the impact of the North Dakota report in Bismarck, and the fact that people are concerned about the implications of that report and what may follow as a result of the facts that have been put on top of the table.

Likewise—of course, we did hold the hearing in South Dakota and your report came out just before we held that hearing. We were very much aware of the impact of that report on the situation in South Dakota, and I was very much interested in what you had to say, Mr. Walsh, about some recent activities on your part, as a member of the State Advisory Committee, and on the part of apparently some of your colleagues in connection with proposed legislation which currently would have had an adverse impact on the ability of Indians to vote.

And I recall very distinctly from our hearing in South Dakota that that in turn would have an, a very adverse impact on their serving on juries, which in turn, of course, ties into the whole law enforcement situation.

As I recall, the situation as far as their serving on juries is concerned is not a very happy one even under present conditions, but the passage of that legislation would have aggravated the matter still further.

Mr. Schwartz' initial question did relate to whether or not there was any up-to-date information that you did want to bring to our attention in the area of law enforcement. This proposed legislation, its impact on the jury selection further related to law enforcement. But I'm just wondering if there was anything else that you'd want to bring us up to date on in the area of law enforcement as it affects the members of the American Indian community other than what was presented to us at our hearing.

MR. WALSH. Mr. Chairman, there is some good news and some bad news. The good news is that specifically our study in 1977 dealt with Charles Mix and Pennington County. In Pennington County we do have, as a result of that study, an Indian/white community relations team, which includes law enforcement personnel, and that's probably a great thrust forward because they are resolving a lot of issues that otherwise would not be resolved.

Secondly, we are doing police stress training with our police department in Rapid City. We will be beginning that in October of this coming year. So we are making some positive strides in that area.

The bad news is that I don't think that the State as a whole took that report as serious as it could have. And I think our SAC committee will continue to push so that it will.

CHAIRMAN FLEMMING. I certainly hope that you do. I'll just simply ask my colleagues if they have—do you have a question?

VICE CHAIRMAN HORN. Well, I want clarification on one point. Mr. Walsh, I didn't quite understand you. And the Chairman sort of mentioned it. I just want to make sure I do understand it. The way I heard you originally, you noted that many Indians do not serve on juries.

I was confused as to the change in the voting rules as to whether that would encourage Indians to serve on juries, or was there an implication that Indians feared to register because they would then be asked to serve on juries. Would you straighten that out for me?

MR. WALSH. It would definitely, under the proposed voter registration law, it would discourage Indian people simply because of the fact that the only way they could serve on juries is—

VICE CHAIRMAN HORN. —to be on the voting register.

MR. WALSH. Correct.

VICE CHAIRMAN HORN. Okay. So I take it there is no problem with Indian willingness to serve on juries. The problem is they have been either excluded from juries or discouraged from registering, so they cannot be selected for juries.

MR. WALSH. You are correct.

VICE CHAIRMAN HORN. All right.

COMMISSIONER RUIZ. Mr. Hensley, you've received me twice in Alaska. And it's my privilege to welcome you to Washington. You mentioned language is a voter participation problem in Alaska, that 200 villages exist where Natives do not read or write English; and that a bilingual ballot is not necessarily the answer.

I have tried to pose the question: what is the answer? For example, the League of Women Voters has a program where ballot measures are explained in the English language to people that only speak English. Would an oral presentation over local radio or in the villages of ballot measures and explain them be of help?

For example, I know of some countries on ballots where people that do not speak the language or write the language, that there is no written language, a red mark or a period on a ballot means "yes", a green bullet or a period—a green period means "no." Perhaps a deer would mean "yes" and the bear would mean "no." I don't know. I'm trying to cope with that statement that you made and would like some sort of an input by you on this problem.

MR. HENSLEY. I don't think we need to use deer and bears on it. But I think what we could use is some more properly trained election judges, although normally they try to use local judges, I think the tendency on the part of the judges is, unless they are specifically trained to provide advice at the poll, the inclination is not to disturb the voter.

COMMISSIONER RUIZ. I'm talking before the polls, before the polls are open, for educational purposes and coming to a conclusion—

MR. HENSLEY. I'm getting to that. I think that the use of radio programs and, in some villages now, television, I think in the language, in Eskimo Indian, I think would be very helpful to the people. My feeling is that the State doesn't want to take the time and the money and the effort to enter into that sort educational process.



COMMISSIONER RUIZ. Do you have broadcasters in Native tongues, Native language there?

MR. HENSLEY. Yes, we do. But there is no program out of the elections office to provide that training.

COMMISSIONER RUIZ. Would that be a positive step in the right direction if it were probed further?

MR. HENSLEY. Yes, it sure would.

COMMISSIONER RUIZ. Thank you.

CHAIRMAN FLEMMING. Commissioner Saltzman?

COMMISSIONER SALTZMAN. No questions.

CHAIRMAN FLEMMING. Mr. Nunez?

MR. NUNEZ. No questions.

CHAIRMAN FLEMMING. Thank you all—yes?

MS. BEASLEY. May I beg your indulgence—

CHAIRMAN FLEMMING. You certainly may.

MS. BEASLEY. I have three documents with me that I would like to share with you, not going into oral testimony. I did prepare—understanding that there would be limits on time for oral statements—I did prepare for you in writing some of the experiences of which I am aware, those that I have been directly involved in, in local communities, urban communities, that do bring Indian into conflict or confrontation with various other segments of the public there, including religious institutions, educational institutions, local government, right across a broad spectrum. So I have given you some actual anecdotes.

CHAIRMAN FLEMMING. We would be delighted to receive that as part of the record. It would be very, very helpful.

MS. BEASLEY. Okay. Then I would like to call to your attention to—the Michigan Department of Civil Rights has just released, as of last week, *The Status of Civil Rights in Michigan* report covering the last 5 years. There is a section here on Indians. It does highlight the Indian health, the standard of Indian health, which is very poor, that there are underrepresentations in institutions of higher education, professional training, and some other things that I think you might be interested in.

The others I have are routine annual reports which do have some statistics in it. I have a copy for each the Commissioners, and I'd like to leave them with you.

CHAIRMAN FLEMMING. If you would just provide those.

MS. BEASLEY. If I may, I realize the degree to which you are concerned and may wish to address your attention to the official agency's legal entities and so forth in their violation or failure to protect Indian rights.

The one that I think in the statement I prepared for you that concerns me the most is the absolutely blatant, flagrant kind of things you find, offensive things in textbooks, and I've cited some incidents where I have tried to assist American Indians in getting certain books



removed that were used in the schools, certainly language and passages in other text material.

I would like to recommend to this Commission—I know you have many things to do—but the book publishers, textbook publishers continue to be the worst offenders of the kinds of books that they put out, and I really think some attention has to be given to this. And I hope you will look at it.

CHAIRMAN FLEMMING. Thank you very, very much. We appreciate all of that material. Yes, Mr. Walsh?

MR. WALSH. I don't know about other States, but it would be something down the line, some basic bread and butter issues for us in the State of South Dakota, and that is the 1980 census. The whole question of redistricting comes up, and it will be a very important issue for us and our SAC Committee. And I suspect it will be in other States.

CHAIRMAN FLEMMING. You'll find that the Commission regards this as a very important issue also. We will be keeping in touch with the various State Committees, and we are delighted to note your interest. Counsel will call the next witness.

MR. ALEXANDER. Mr. Huerta has provided us with a written statement which I would like to have entered into the record at this point.

CHAIRMAN FLEMMING. Without objection, it will be entered in the record at this point.

[John Edmond Huerta and James Schermerhorn were sworn.]

**TESTIMONY OF JOHN EDMOND HUERTA, DEPUTY ASSISTANT ATTORNEY  
GENERAL FOR CIVIL RIGHTS, AND JAMES SCHERMERHORN, DIRECTOR,  
OFFICE OF INDIAN RIGHTS, CIVIL RIGHTS DIVISION, BOTH, U.S. DEPARTMENT  
OF JUSTICE**

MR. ALEXANDER. Starting with Mr. Huerta, could you identify yourselves for the record, your proper name and the position you hold?

MR. HUERTA. I'm John Edmond Huerta, Deputy Assistant Attorney General for Civil Rights, the Department of Justice.

MR. SCHERMERHORN. My name is Jim Schermerhorn, I am the Director of the Civil Rights Division's Office of Indian Rights.

MR. ALEXANDER. Mr. Schermerhorn, could you just very briefly tell us what the point of having a special Indian rights section in the Civil Rights Division is?

MR. SCHERMERHORN. Several years ago, when we were reassessing the direction that the Civil Rights Division was taking, we recognized that there were many minorities, the problems of which we had not addressed, and a task force or a study group was set up in 1972 to look into the civil rights problems specifically of Indians.

And after 6 months, that study group found full-scale and widespread racial discrimination against Indians, and recommended to the Assistant Attorney General that a special office be set up to handle

Indian civil rights problems because of the uniqueness of the laws which govern Indians, their culture, and because of the particular problems we expected to face.

MR. ALEXANDER. Mr. Huerta, with respect to overall policy within the Department of Justice, does the Civil Rights Division have a formal or given an ad hoc role in the judgments that are made concerning the wide range of Indian issues that the Department of Justice is responsible for?

MR. HUERTA. Well, we have, say, a great deal of policy determination on civil rights issues of Indians, and with regard to non-civil-rights issues, we do not have a great deal of input in terms of Indian issues.

But I would add that we don't have a great deal of input on other non-civil-rights issues throughout the Department either.

MR. ALEXANDER. How do we determine what has civil rights implications and what does not? For example, *U.S. v. Washington* is a treaty fishing rights case. The experience of many people in Washington State has been that the fallout from the decision has created significant and substantial civil rights problems, law enforcement, education, community services, and so on. Would your office be involved in that issue?

MR. HUERTA. You're right, Mr. Alexander. Most issues are like an onion, when you start to peel them down, there are implications in the civil rights area as well as many other areas. It's my understanding that in the *U.S. v. Washington* case, subsequently the Civil Rights Division, after initial policy was formed, was involved from the civil rights aspect, investigating individuals who deny federally protected rights to Indians that were being exercised pursuant to 245, Title 18.

MR. ALEXANDER. Yes, the situation that we've had testimony about this morning, which was the hiatus in law enforcement following the *Oliphant* case, I am aware that a number of Indian groups recommended to the Department of Justice that the Civil Rights Division, the Criminal Division, coordinate the Department, Justice's policy determination as to who had jurisdiction, who had responsibility. Did the Civil Rights Division play a role in this process?

MR. HUERTA. Well, the coordination being handled through the Office of Legal Counsel and Mr. Harmon will be testifying before you tomorrow. The Civil Rights Division was invited to attend meetings which discussed that topic, and we did.

I believe—Jim, you might correct this—I think we prepared a paper on this; didn't we?

MR. SCHERMERHORN. We conducted several investigations that—we had made some recommendations as participating in the task force. That was conducted earlier, but not recently.

MR. ALEXANDER. You have not. What you were referring to, just so that we're clear, that where a State or a county government would have jurisdiction or responsibility for enforcing law against non-Indians who commit certain type-crimes on an Indian reservation, that the

failure to do so could, in fact, constitute a civil rights problem and be something that you might litigate. Is that fair?

MR. SCHERMERHORN. That's correct, that's correct. It could violate, for example, the Safe Streets Act nondiscrimination provisions, it could violate the 14th amendment of the Constitution, and perhaps violate other statutes.

MR. HUERTA. Perhaps Title VI, and we have investigations going on currently in two States in that regard.

MR. ALEXANDER. To shift a bit, in terms of the decision in *Martinez v. Santa Clara Pueblo*, which basically restricted Federal court access for Indian civil rights cases beyond *habeas corpus*, how has that affected your Office's role in litigation?

MR. SCHERMERHORN. Mr. Alexander, I don't really think that it has had any particular consequences in the Office of Indian Rights. In the little over 5 years that we've been created, we've participated in approximately 60 actions to secure the civil rights of Indians. And only two of those involved tribal government.

The vast majority of circumstances when situations indicating the violation of Indian Civil Rights Act were presented to us, we began to negotiate with the tribes to reach an agreement. So I like to believe that we are steadily increasing our credibility with the Indian community.

I don't particularly think the *Martinez* decision played any major role. *Martinez*, of course, held that there is no private right of action in Federal courts. *Martinez* did not say that the Indian Civil Rights Act is no longer valid. It is a valid act of Congress.

The question of whether or not there is any Federal enforcement responsibility pursuant to that really has not yet been decided.

MR. ALEXANDER. Okay. You indicated in the answer to this previous question that you were hopeful that you were increasing your credibility within the Indian community. That at least has an implication that you have had a credibility problem. Is that accurate?

MR. SCHERMERHORN. I think it is accurate to say that all Federal Government officers and officials have problems dealing with the Indian community, particularly non-Indians such as myself. And I think that we have tried to do our best to contact, go out into the field, meet as many Indian leaders as we can contact.

I think in my prepared statement I indicated that we've contacted about 100 tribes and made about 100 separate trips for this purpose, to learn the problems of the Indian community and to listen, as well as to explain what our responsibility and authority really is. I think we have quite a ways to go, quite frankly.

MR. ALEXANDER. You also mentioned the task force that you had served on at the Department of Justice, is that accurate, in a previous administration?

MR. SCHERMERHORN. Yes, sir.



MR. ALEXANDER. As I remember that report, the Civil Rights Division at that time supported a comment in that report that said that there was a substantial and continuing coordination problem within the Department of Justice when it came to Indian rights, is that accurate?

MR. SCHERMERHORN. That is substantially accurate, the task force, as I recall and it has been several years now, concluded that we could better—"we" meaning the Department of Justice—could better coordinate our involvement in Indian-related matters.

MR. ALEXANDER. As one of the people who was there then and is there now, have you seen any improvement?

MR. SCHERMERHORN. I have seen no formal structure created to address those problems. There have been improvements in the sense that many of us who deal in the Indian area have taken up on an ad hoc basis efforts to coordinate our activity.

I coordinate with my contemporary in the lands division, for example, on a weekly basis concerning what litigation we're in, so the issues that overlap, we have less risk of presenting two different views of the Federal Government.

Certainly, the Solicitor General's office coordinates all briefs that are filed on the circuit court.

MR. ALEXANDER. Sure. I'll tell you what I'm worried about, actually, or what concerns me is *Oliphant* came down last spring. It's almost spring again, a year later. And we do not have a statement issued that I am aware of from the Department of Justice as to its view as to who, in fact, has jurisdiction with regard to victimless crimes.

You're pursuing litigation, possible litigation in terms of local governments who may not be enforcing the law. Presumably they're going to argue that the law was very unclear, that didn't have a responsibility, that it was a Federal responsibility. And in a sense, one arm of the Department of Justice has an equal protection problem created, because other arms of the Department of Justice have not been able to affirmatively respond to the Supreme Court's decision on *Oliphant*.

MR. SCHERMERHORN. Perhaps one of the ways that the questions can be answered is in the form of litigation, because most certainly that question will come up, specifically who has what responsibility, whether it's Federal Government or the State governments or whether it's a concurrent exercise of jurisdiction.

MR. ALEXANDER. Right.

MR. SCHERMERHORN. Our point is that where States have a responsibility now to enforce laws in victimless crime situations or against non-Indians, and they do not—that that impacts adversely on Indians and it should be corrected, and we are going to proceed on that.

MR. ALEXANDER. Yes. My point was not the substantive decision as to what the law is or perhaps should be, but the process within the Department of Justice to reach decision as to—whether or not in your view that process is an appropriate one or whether it need be improved.

MR. SCHERMERHORN. Well, in addition to the general task force report, we also had a subcommittee of that task force with specific findings on jurisdiction and law enforcement questions.

And there has been no direct response to that as well. So you're right. There has been no specific policy response that I'm aware of concerning post-*Oliphant* law enforcement situations.

MR. ALEXANDER. Mr. Huerta, in the task force report that's been referred to, the Civil Rights Division I believe supported a recommendation that a coordinating entity of some form be created in the Deputy Attorney General's Office. At that time, I believe there was only one Deputy Attorney General. Does the division at the present time have a position as to what kind of entity or mechanism should be instituted within the Department to better coordinate Indian issues?

MR. HUERTA. I don't believe the position of the Civil Rights Division has changed any. I think we could still stand by our earlier position, that a coordination mechanism in the Deputy's office would be the most desirable alternative to those mentioned in that report.

MR. ALEXANDER. Thank you. In a number of our field hearings and also in some of the testimony from the previous two panels, a number of civil rights-type issues have been raised, some of which may be within your jurisdiction and some of which may not. I'd like to get into some of that and have you tell me whether or not these are subject areas which your office can, in fact, do something about.

The issue of child custody, the disproportionate number of Indian children that have been taken from their homes, does your office have a role in that?

MR. SCHERMERHORN. We have not in the past, Mr. Alexander. And I don't think, as I recall, the new Child Custody Act—there is nothing specifically that vests any responsibility or authority to take any actions with the Department of Justice.

Now, we can on occasion participate as an *amicus*, particularly when cases reach the Supreme Court level. There is one now pending on *certiorari* that's been brought to my attention. Now, that's a possibility, but we don't have standing to initiate complaints as we do under the 1954, '65, and '68 Civil Rights Acts, for example.

MR. ALEXANDER. Okay. The sterilization of Indian women?

MR. SCHERMERHORN. The same answer basically applies. We have forwarded information to the Indian Health Service and to HEW, whose Office of Civil Rights has responsibility internally within HEW to coordinate that.

MR. ALEXANDER. This sort of an issue with private hospitals and not simply IHS hospitals, would your office have a role?

MR. SCHERMERHORN. Not regarding private hospitals.

MR. ALEXANDER. Private hospitals receiving Federal funds?

MR. SCHERMERHORN. It would be possible that there would be some avenue through Title VI of course, the initial hearing in Title VI has to be done by HEW and then referred to the Justice Department. We have no initial authority to file a suit based on Title VI.

MR. ALEXANDER. Police abuse?

MR. SCHERMERHORN. Yes, clearly.

MR. ALEXANDER. FBI abuse?

MR. SCHERMERHORN. The regulations of the Justice Department, as I understand them, call for abuses by any Federal official, including the FBI agency, to be referred to the Office of Professional Responsibility and then, action could be taken, clearly, in the cases that have been brought by the Civil Rights Commission on FBI agents, that under certain circumstances we do have jurisdiction.

MR. ALEXANDER. Given the volume of complaints that have been made, at least in the media or at least in the public sense, growing out of Pine Ridge and other situations, to your knowledge has the Civil Rights Division participated in any court action against any individual FBI officer?

MR. SCHERMERHORN. Any court action? No, sir.

MR. ALEXANDER. Voting rights?

MR. SCHERMERHORN. Yes, we clearly do, and we have many lawsuits now underway, in fact, that's one of the most—one of our most recent principal efforts is to secure the American Indian's right to vote.

MR. ALEXANDER. In the voting rights area, I'm curious as to when you, in effect, win a case for the Indian tribe or cluster of individuals, have you observed in your experience any reaction in the non-Indian community to the court victory, any backlash?

MR. SCHERMERHORN. A lot of rhetoric. But I don't think there has been an awful lot of specific backlash problems. I do know of certain circumstances where we have litigated a case—Apache County, Arizona. And we were instrumental in having the complexion of that county entirely changed. Prior to the suit, it was controlled by non-Indians. After the suit, it was controlled by Indians.

That's a very unusual circumstance that the Indians had enough population in the county to actually control it. Now, in that county, I understand from discussions with some of the commissioners that there have been difficulties for them in assuming their seat and sitting on the board and conducting the work as a supervisor in Apache County, Arizona. But the problem has not arisen to the extent that we've had to use contempt or other types of—

MR. ALEXANDER. Private housing discrimination in border towns where you're dealing with small individual units of housing?

MR. SCHERMERHORN. There is a particular problem there because of what is generally known as the Mrs. Murphy exemptions in the Fair Housing Act, which indicates that there are some exemptions, that Title VIII does not apply if, for example, a certain private landlord owns less than a certain number of units, and that has been the case.

We have had to close cases where we cannot pursue our pattern and practice jurisdiction, which is the only jurisdiction that the Federal Government has; it does not have independent jurisdiction to sue private landowners.



MR. ALEXANDER. In the border town context again—it has been so long, I can't remember what we used to call it in the sixties, but basically access to public services, be it a restaurant—

VICE CHAIRMAN HORN. Public accommodations, public institutions, public facilities.

MR. ALEXANDER. Public accommodations.

MR. SCHERMERHORN. Well, we have brought several cases. And I think some of them are particularly noteworthy because they bear on cases that have been discussed by other witnesses this morning. We have brought cases to ensure access to services by public hospitals for the provision of emergency room service.

In two particular hospitals, Indians were being turned away from hospitals when they were in need of emergency services. We have remedied that, and we are attempting to work with the Indian Health Service to try to urge them to use their contracting authority and other means that they have to treat these problems in a nonlitigative sense.

It's very difficult and time-consuming to treat these problems one at a time in a litigative context. Perhaps administratively agencies such as the Indian Health Service can use their contracting authority to remedy this problem.

Recently we have successfully concluded a lawsuit against the city of Sault Ste. Marie, Michigan, which a prior witness was discussing. And I think has significant impact on the housing for Indians in Sault Ste. Marie. The city had refused to allow HUD-sponsored housing programs to tie into the water and sewer lines of the city on the grounds that it was held in trust and there were various other problems with it.

We brought a suit last April, charging that this, in fact, made housing unavailable and was in violation of Title VIII of the '68 Civil Rights Act. Within the last 2 weeks or so, we've been able to negotiate a consent decree with the city, with the concurrence of the tribe, that allow 65 units of housing to be created, and compels the city to allow the HUD project to tie into the sewer and water lines. Hopefully, that will make housing available for perhaps 250 to 300 people—Indians—in the Sault Ste. Marie area.

MR. ALEXANDER. Mentioned in testimony earlier today was an issue that has come up before, and which is the conflict between the Federal policy of self-determination and the vagueness, perhaps, of a number of the civil rights laws. Now Title VII, as I am aware, has a specific exemption for Indian preference.

MR. SCHERMERHORN. That's correct.

MR. ALEXANDER. Mr. Bellecourt alleged that there was a problem in obtaining tax-exempt status from the IRS because this program was designed to service Indians, run by Indians, and employ Indians, basically. Presumably the IRS has some sort of Title VI problem with that.

Does your office play any coordinating or information role with the other Federal agencies who have program responsibilities in terms of funds or exemptions for Indian tribes?

MR. SCHERMERHORN. Yes, we do on a very limited basis, understanding the small size of our office and the principal responsibility being to litigate, since we are the only ones in the Department who have the authority to do that in the executive branch.

But we have had on a number of occasions an opportunity to discuss with other Federal agencies their responsibilities and the problems that they've had. Part of the coordination problems come up are in the area of—the Department of Agriculture, for example, has an extension service which accords services to farmers.

The BIA also runs a very similar service. The question is: are Indians also eligible for the Department of Agriculture's services and can the BIA limit its funds and its assistance to Indians? We are in the process of working out some of those types of questions with the Department of Agriculture.

We have on any number of occasions discussed housing matters with HUD and food stamp coordination problems with Agriculture. But it is certainly on an ad hoc basis, and is not one of the things that we spent a vast majority of our time on. We try to be litigation-oriented as much as possible.

MR. HUERTA. May I add something to Mr. Schermerhorn's comment?

MR. ALEXANDER. Sure.

MR. HUERTA. The Civil Rights Division also has coordination authority for Title VI and President Carter has urged members of his cabinet post the *Bakke* decision to clear any affirmative action plan with the Department of Justice. And those are usually, routinely, referred to the Civil Rights Division for our comment. And these type of questions of Indian preferences do arise in that context.

I'm sure the Commission is aware that we are very actively—and that's not the Office of Indian Rights; it's our Federal program section involved in that.

MR. ALEXANDER. As a general proposition, leaving aside the particular agricultural program, would it be fair to say that where a program is designed to benefit the Indian tribe or group pursuant to the congressional and executive branch policy of self-determination, that it would not be a violation of Title VI for Federal funds to be spent for the exclusive use of Indians?

MR. SCHERMERHORN. That is the position that we have taken in the past—in fact, formally took during a conference of the Federal Bar Association 2 years ago, where we indicated that the beneficiary, congressionally-designated beneficiary where tribes or tribal members then clearly limits the expenditure of funds to that membership.

Indian Self-Determination Act funds, for example, is the type of thing that would fall under this category.

MR. ALEXANDER. Suppose a Federal agency that is funding a project in the middle of a Navajo Reservation wishes to attach a Title VI-type requirement to it. And you, as a matter of policy, disagreed with that. What would happen to a situation like that?

MR. HUERTA. I'm not sure I know what you mean by "attach a Title VI" policy to it.

MR. ALEXANDER. Well, they want them to sign a statement saying it will serve all members of the community, regardless of race, etc.

MR. HUERTA. They can do that and still fully be consistent with, have an Indian preference in terms of having an affirmative action program, as Justice Powell's decision in *Bakke* would indicate, would find that there is prior discrimination against Indians—

MR. ALEXANDER. But, that would be in the employment area. I'm basically referring to—

MR. HUERTA. You could also do that under Title VI, depending on the type of services.

MR. ALEXANDER. Change the example—

MR. HUERTA. Sir, I'm not trying to fight you. I'm just trying to understand.

MR. ALEXANDER. Well, what I'm proposing is that a Federal agency, outside of the Department of Justice, disagrees with the view that was just expressed. You take the view that you expressed; how would that issue be resolved between the two competing agencies?

MR. HUERTA. It could only be resolved, first of all, if we were to hear about it—we're most likely to hear about it conducting one of our coordination reviews which we do on a periodic basis. And we just conducted a review of Interior and Labor Departments in the last year. We're not likely to get around to them for another 4 or 5 years, given what our resources are. That's normally how that would arise, unless we would hear about either through Jim's contact—Mr. Schermerhorn's contacts with the Indian community or somebody in that agency. We try to develop good contacts with other Federal Departments, and they'll say: they really have a crazy policy over here. The local commission on civil rights may have hearings and bring it to our attention.

MR. SCHERMERHORN. There is no specific Federal coordinating role though, if I'm sensing the question correctly, that differences are resolved on an ad hoc basis when you're made aware of them.

But there is no interagency review that I'm aware of in Indian policy matters.

MR. ALEXANDER. You mentioned a moment ago that you have a very small staff. How small is that staff?

MR. SCHERMERHORN. A staff of eight attorneys and two paraprofessionals.

MR. ALEXANDER. And in the next budget year is that projected to rise or diminish?

MR. SCHERMERHORN. It's projected to diminish. My understanding is that OMB has indicated a reduction of 25 percent. I'm hopeful that it won't have to be implemented, and that there will be means by which to reassess the need for the Office of Indian Rights and the work that we're doing.



MR. HUERTA. I'd just like to add to that, that the division has, is committed to ensuring that civil rights of the Indians are enforced. To the extent that we have, we'll require other sections to litigate Indian cases, even though their particular staff is reduced.

MR. ALEXANDER. From your joint perspective, how serious a problem do you perceive there is in terms of actual violations of Indian civil rights by State and local entities, if you will, ongoing? How much of the need is currently being met?

MR. SCHERMERHORN. I think that there is widespread racial discrimination by State and local governments against Indians in areas of voting, housing, and many of the other areas that we've talked about, employment, for example. We have just scratched the surface.

As you know, we have set up certain priority areas within our broad mandate. And those areas have been the Federal services cases I've mentioned and the six or seven voting cases that were brought. We have—I know one of the other witnesses talked about the voting problem in South Dakota. We have two cases ongoing now that we're litigating against the State of South Dakota. We have several more under investigation that may potentially lead to that.

There are whole areas that we are just beginning to scratch the surface on: employment, education, and other very important areas. We just have not had the time or the staff to do as much as we would like to do.

MR. ALEXANDER. So scratch the surface would be—

MR. SCHERMERHORN. —scratch the surface would be, at best, what we have done in many of these areas, particularly in the urban area. We want to reach those problems as soon as we can, as we believe that they certainly exist, particularly in the urban area.

MR. ALEXANDER. Mr. Chairman?

CHAIRMAN FLEMMING. I'll just ask my colleagues if they have questions. Commissioner Horn?

VICE CHAIRMAN HORN. Let me ask both of you gentlemen—this example, as we talk about coordination, we heard testimony from one of the previous witnesses, Mr. Means, the allegation that an Indian prisoner in a Federal facility at Leavenworth was being tortured, etc.

Bureau of Prisons reports to the Attorney General within the Department of Justice. You are within the Department of Justice. How does one deal with that case as to whom do you represent? Do you represent under the aid of the Indian Civil Rights Act or the various other acts or various treaty obligations, depending on if this person is a member of a particular tribe, the Indians of the United States? Do you represent the Bureau of Prisons? How do you go about coordinating your efforts to resolve that question with the Department of Justice?

MR. SCHERMERHORN. When there is a criminal connection—the testimony that we've heard here today is that an inmate has been abused or mistreated by a guard—then clearly we have the authority

and have exercised in the past criminal prosecutions against Federal officers who have violated the civil and constitutional rights of inmates.

In one particular case that I prosecuted, a BIA officer mistreated an Indian prisoner in the Bureau of Indian Affairs jail. And we criminally prosecuted that individual for violations under 18 U.S.C. 242. The difficult question arises when a lawsuit is filed and one of the other divisions generally represents the Bureau of Prisons, and the position that may be taken in a particular case may differ from positions that we have taken in *amicus* participation on behalf of Indian prisoners, which we have done in several cases.

Those cases are worked out on an ad hoc basis. The Solicitor General's Office must determine ultimately, with the advice of the Attorney General, what position the Department is going to take.

MR. HUERTA. I'd like to add to that we have not litigated against any Federal prisons, we have on an informal basis been asked to conduct an investigation on certain Federal facilities. Right now, we have one going on in Marion Penitentiary at the request of Norm Carlson. And this is something in my brief year and a half that is somewhat rare. But at Mr. Carlson's urging, we are conducting our own completely independent investigation to see whether the allegations that have been made of unconstitutional conditions of confinement, to determine whether those are true or not.

VICE CHAIRMAN HORN. I noticed on page four of your prepared statement, you stated: "the objectives of the Office of Indian Rights are as follows—" and "D. The defense of Federal officials charged with violations of the civil and constitutional rights of American Indians in those circumstances when such a defense would promote the overall advancement of Indian civil rights in a manner consistent with the Constitution and Federal Laws; at the same time, provide the Federal officials involved the defense to which they are entitled under law..." Sounds to me as if there is some mutually conflicting goals within that sentence.

MR. SCHERMERHORN. We have on occasions had some success, in representing the Secretary of the Interior for example, in convincing him to drop regulations that discriminated against Indians. We had, for example, represented the Interior Department in a case called *U.S. v. Whiting*, which dealt with the definition of Indian preference. And the question was whether or not the Indian tribes ought to define the preference or the Secretary of the Interior ought to define preference. We convinced the Secretary of Interior that in these circumstances the tribe should define preference. In *Mancari v. Morton*, we were very successful in having the Supreme Court uphold Indian preference generally against challenges by non-Indians.

These are the types of cases that I referred to in section D of the report. There are difficulties, you're right, Commissioner, and it's uncharted area and it's difficult to walk the line and find essentially



the right tenor. But I think at least under the types of cases that I have mentioned to you, I think we have made an impact in these areas that are beneficial to Indians.

MR. HUERTA. This is an area that cuts across all Civil Rights Division workers; often we do defend other Departments on civil rights matters. And that's made on an ad hoc decision basis between Drew Days and Barbara Babcock. And I have been delegated the responsibility which I do—I meet several times a week with my counterpart in the Civil Division.

We discuss all new litigation that's come under defensive posture within the Department, in the Civil Division, and we decide whether it's a Civil Rights Division case or Civil Division. And there is a mixture of policy and resource questions that go into in—after we decide who will defend the case, we very closely monitor what positions are being taken in the litigation so that we don't have a situation where a case is taken, say, by the Civil Rights Division and the Civil Division doesn't agree with and vice versa.

VICE CHAIRMAN HORN. Well, along that line—I don't know if you were in the room—but our first witness this morning, the attorney for the Native American Rights Fund and the director of the American Indian Law Center, I explored with them the possibility of the proposal several years ago—the Indian Trust Council.

They didn't like that idea. They felt that would be too easy for people in Justice to pass those cases off to the Indian Trust Council and say: well, we don't have to worry about this now. And certainly in various meetings with American Indian leaders in New Mexico several years ago, I had exactly the same reaction when one chief said, "We want to be represented by the United States of America," which leads me to several points. The first one of which is one thing we discussed this morning: is, should there be a disclosure in an organized manner within an administrative process whereby these decisions as to possible conflicts of interest are made would be available for others to have input from the Indian community.

In essence, you might have an Indian impact statement, I think was the suggestion, on a particular decision—people could comment. You would escalate this above the record almost like an administrative hearing record, have an opportunity for input prior to a judgment being made as to whether the Department does have a conflict and whether either separate counsel should be maintained or whether the U.S. won't take a position, etc. Do you have any reaction to this process?

MR. HUERTA. I can't speak on behalf of the Department because taking that type of position to that extent, it would have to be cleared, but I have in my statement—

MR. SCHERMERHORN. On page 24 I believe we did make reference to precisely that, an Indian impact procedure to address some of the conflicts that arise in trying to implement Federal civil rights policies with regard to Indians.



I share Mr. Deloria's concern that perhaps we not call it that because of all the bad connotations that flow from it. But I think the idea is what we wanted to convey. And that is an idea that there must be some way to address these problems before they become major problems and at the conceptual stage, this is what we would like to do.

VICE CHAIRMAN HORN. Do you think that would work? I mean, without committing the Department, which I realize you can't, does it make sense legally to have that much on the public record and be prior to the making of a decision? Is it feasible from a day-to-day, practical, operating standpoint?

MR. SCHERMERHORN. I think we try to operate in a very open atmosphere. And much of the information is available to the public through freedom of information and other means. So I, for one, think that it's very helpful to operate as openly as we can.

VICE CHAIRMAN HORN. You see, it's one thing to get freedom of information requests after the decision has been made. It's another thing to feel you're consulted and a participant in the decision. I think that's what the point at issue is. Well, let me move to another area. What is your feeling as to whether a statute of Congress can overrule a treaty which this government has solemnly entered into years ago with an Indian tribe? Can it?

MR. SCHERMERHORN. Well, the courts have held that the Congress has plenary power. And I interpret plenary power to mean it can by themselves supersede the treaties. The only comment that I would have, Commissioner, is that that has been the decision of the courts. Generally, we are not involved in the trust responsibility area where these problems often come up. Our responsibilities are statutory and hence, these problems are more often dealt with by the Lands Division and by the Office of Legal Counsel.

VICE CHAIRMAN HORN. Well, I wonder could you, Mr. Huerta, speak for the Department of Justice, as to the degree to which it feels it has a trust responsibility, despite the ruling of the court. This gets down to the Attorney General's comments, as you know. Do we have conflict of interest or don't we? Who represents the people?

MR. HUERTA. I clearly could not speak for the Department on that issue.

VICE CHAIRMAN HORN. So, I take it, if we're going to get at this, we have to get testimony from either the Attorney General or the Deputy Attorney General, Mr. Alexander, in terms of a philosophical sense.

MR. HUERTA. The Office of Legal Counsel would initially formulate the policy. And it would be discussed with the Attorney General back and forth as it gets developed.

VICE CHAIRMAN HORN. Now, the coordination review, as you referred to—and you mentioned two Departments in passing. And you admit that maybe they only occur every 4 or 5 years. What is the

process by which you get an agenda for what items are on the table during the coordination reviews? Who in Justice is involved? Is it all relevant divisions of Justice in relation to a particular Federal agency or what?

MR. HUERTA. Title VI Coordination Unit, the Federal Program Section. I may just say on the side, we're having a reorganization internally with the Civil Rights Division to be joined with the Sex Discrimination Task Force, which also conducts systematic reviews of Federal agencies for civil rights functions as they impact affirmatively or negatively on sex discrimination basis. The Title VI unit to which I referred has a staff of nine coordinators, equal opportunity specialists, who work with a couple of lawyers who are specialists in the Title VI, that conduct systematic reviews of an agency. And they'll go in and see exactly what the Title VI enforcement function is; whether the internal regulations are being followed, the reporting mechanisms, the type of complaints; whether there's been notice given to the Justice Department, which they are required to do whenever there is a Title VI investigation.

If there is a finding of a noncompliance, there again has to be notification and find out if they're carrying out the statutory and regulatory, mandated obligations with reference to Title VI.

This is quite a systematic and very thorough review in which the final reports are sometimes many hundreds of pages long. After a report is developed, sometimes—and this happened just recently with Labor. We had a task force made up of Labor and Department of Justice Title VI coordinators. You go through and set out a plan, coordination plan, for implementing our recommendations pursuant to this review, and these are negotiated and finalized in a memorandum of understanding between us and the agency. With the Department of Interior, for example, we're at the point of signing a final memorandum of understanding now. With Labor we're at the task force level.

VICE CHAIRMAN HORN. Is there an Indian perspective given by your office, Mr. Schermerhorn, to those Title VI reviews?

MR. SCHERMERHORN. That's correct, Commissioner.

VICE CHAIRMAN HORN. Okay. So you have a chance then to participate or at least suggest—

MR. SCHERMERHORN. We do have a chance to participate. In a recent example of the Department of Agriculture, BIA, an Extension Service problem directly came from—uncovered from a Title VI review. And they asked us to work with them to resolve the problem.

VICE CHAIRMAN HORN. I have one last brief question. I find it fascinating that the Office of Management and Budget, in its majesty, with some very small staff given the scope of its responsibilities, reaches down in the Federal Government of hundreds of billions of dollars and says there should be a 25 percent cut in the staff which consists of eight attorneys and two paralegals in the Office of Indian Rights within the Civil Rights Division. Was it OMB that made that

25 percent cut decision, or was it the budget office of the Department of Justice, or just who was it?

MR. SCHERMERHORN. To the best of my knowledge, it was the Office of Management and Budget.

CHAIRMAN FLEMMING. Just to make the record straight, doesn't that tie back to a ceiling that has been put on Federal employment by the Congress when they passed the Civil Service Reform, and that requires a 2 percent cut across the board?

MR. HUERTA. Yes. The Civil Rights Division had a cut in its budget of some 5 work-years. In fact, we were given new positions, but we weren't given any money for it. In fact, we were given even less money than the previous year. We didn't cut the Office of Indian Rights. We took the cuts elsewhere. And the situation with this current fiscal year, the outlook looks just as bleak for us in the future.

VICE CHAIRMAN HORN. The 25 percent cut is besides the 2 percent. We all suffer those things. So you're saying this is a particular mandate of OMB. Is that correct, Mr. Huerta?

MR. HUERTA. No. The 25 percent cut I believe came about—I'm not certain how the exact figure came about. But it's through the priority ranking system in terms of where lines are drawn for what packages. As we ranked out programs and lines were drawn, they cut into the Indian rights program.

VICE CHAIRMAN HORN. Well, maybe you could get the budget director at Justice to furnish for the record how did the 25 percent cut come about, at what level of decision, so that we might have that in the record.

CHAIRMAN FLEMMING. Yes, without objection that will be inserted in the record at this point. Any other questions?

COMMISSIONER RUIZ. Yes, I have a question, Mr. Chairman.

COMMISSIONER RUIZ. Concerning a question by my colleague, Commissioner Horn, as to Indian treaties, would be it fair to state that even though Congress has plenary powers over Indian treaties, that it cannot overrule the Constitution of the United States, which is the supreme law of the land?

MR. SCHERMERHORN. It's true.

COMMISSIONER RUIZ. You would say that would be fair and true?

MR. SCHERMERHORN. Yes.

COMMISSIONER RUIZ. Now, there is an article in the United States Constitution which says, "This Constitution and the treaties made pursuant thereto shall be the supreme law of the land." How can those be reconciled?

MR. HUERTA. They probably can't be. But we in the Civil Rights Division don't formulate—

COMMISSIONER RUIZ. Pardon?

MR. HUERTA. In the Civil Rights Division, we don't formulate that policy. We are not consulted as to the position the court took with reference to the particular decision that Mr. Schermerhorn referred to earlier.



COMMISSIONER RUIZ. Well, all I've been reading is about the plenary rights of Congress. And I have found no reference specifically to this clause in the Federal Constitution that ties together the Constitution and the treaties as being the supreme law of the land.

MR. SCHERMERHORN. The only thing that I could add, Commissioner, is that the Supreme Court has held on a number of occasions that the Congress can pass laws similar to this that have in effect abrogated treaties.

COMMISSIONER RUIZ. That's right; that's statutory. That's statutory law overruling the supreme law of the land.

COMMISSIONER SALTZMAN. It's based on a provision of the Constitution which is ambiguous, the Supreme Court—

COMMISSIONER RUIZ. Well, the constitutional provision that is ambiguous is the Congress can regulate commerce for the Indians. Is that it?

MR. SCHERMERHORN. That's basically where the authority stems from.

COMMISSIONER RUIZ. And they forget about the other part of the Constitution. It's very interesting to me. And I was just wondering what kind of a reaction you had. That's the reason I asked you whether that would or would not be a fair statement. Apparently it is. And some day, just like the laws that we have been observing within the last 20 or 25 years, one of these days they're going to get that straightened out and maybe reverse the whole thing, just as they did with relation to the civil rights acts. To my satisfaction, it isn't cleared up by this verbiage that I've been reading.

CHAIRMAN FLEMMING. Any further questions?

COMMISSIONER SALTZMAN. One brief question. In the Office of Indian Rights, are there any Indians on the staff?

MR. SCHERMERHORN. Yes, there are. There are two.

COMMISSIONER SALTZMAN. Thank you.

CHAIRMAN FLEMMING. Any further questions?

Thank you very, very much. We appreciate the work that's going on in the Civil Rights Division. We appreciate very much your coming here and sharing your experiences with us.

MR. SCHERMERHORN. If we can provide any further information please write us a letter and let us know. We will be glad to provide any—

CHAIRMAN FLEMMING. We certainly will.

MR. SCHERMERHORN. We appreciate the opportunity to be here. Thank you very much.

CHAIRMAN FLEMMING. The hearing will be in recess until 1:45.

Afternoon Session, Monday, March 19, 1979

CHAIRMAN FLEMMING. The hearing will come to order. Counsel call the next witnesses.

MS. HUBER. Yes, could we have Mr. Richard Reid and Mr. Edmund Nakawatase please?

[Richard Reid and Edmund Nakawatase were sworn.]

**TESTIMONY OF RICHARD REID, PRESIDENT, INTERSTATE CONGRESS FOR  
EQUAL RIGHTS AND RESPONSIBILITIES, AND EDMUND NAKAWATASE,  
NATIONAL REPRESENTATIVE FOR NATIVE AMERICAN AFFAIRS, AMERICAN  
FRIENDS SERVICE COMMITTEE**

MS. HUBER. Beginning with Reid, could each of you state your name, the organization you represent, and the position you hold?

MR. REID. My name is Rick Reid. And I am the president of the Interstate Congress for Equal Rights and Responsibilities.

MR. NAKAWATASE. My name is Ed Nakawatase and I'm national representative for Native American Affairs of the American Friends Service Committee.

MS. HUBER. Mr. Reid, what is your occupation and where do you reside?

MR. REID. I'm a farmer and a rancher, and I reside on what is known as the Fort Peck Indian Reservation in the northeast corner of the State of Montana.

MS. HUBER. How long have you and your family lived in that area?

MR. REID. I'm the third generation. My grandfather lived around on the outskirts of the reservation south of the Missouri River before the reservation was opened for homesteading in 1913. And he followed the settlement north across the river in approximately 1915.

MS. HUBER. Thank you. Could you tell us when and under what circumstances the Interstate Congress on Equal Rights and Responsibilities was founded?

MR. REID. Basically, the Interstate Commerce for Equal Rights and Responsibilities—and I'll shorten the name by using the abbreviation of ICERR—was formed February 23 and 24 of 1976 at a meeting in Salt Lake City, Utah. Since that time, we've expanded from the original meeting, of which I wasn't aware of or wasn't present at that time. There were 13 States represented at that meeting. Since that time, we've expanded our organization to include people in 26 States now. We've expanded from basically the reservations in the West to the East Coast, which is affected by the Indian land claims on the East Coast.

MS. HUBER. What concerns or circumstances provided the impetus for the founding of your organization?

MR. REID. We look back to approximately 10 years ago. And we felt that we lived in relative harmony in our area for 40 or 50 years from the time of the homesteading up until about the mid-sixties—approximately in that time range. From that time period on, we've seen a growing or an increasing demand as far as tribal governments were concerned, such as the sovereignty, the jurisdiction, the assessment or assertion of the tribal rights.

We watched that for approximately 10 years with the feeling that sooner or later, it would settle back down to the norm, or what we consider the norm, where we had State jurisdiction over the deed or portions of the lands that we owned on the reservations. It finally started to dawn on us 3 or 4 years ago that maybe these demands were not going away. They were increasing intensely; they were increasing in scope and they were ever-expanding.

I think it's highlighted a couple of years ago, the Congress of the United States instituted the American Indian Police Review Commission, and in that Commission, it pretty well sums up the problems that we foresaw before that. We were told that that would never come to be, that those problems were really—we were just imagining things. But Congress instituted the American Indian Policy Review Commission. We were grateful for that.

Congress was set out or was assigned—this committee was assigned to examine Federal Indian policy in the past, how it hadn't been effective for the Indian people, I would assume, and how they could correct that and make recommendations to what could be Federal Indian policy in the future. We applauded that effort, or the start of that. But it was, it turned out to be a new reexamination of Federal Indian policy—turned out to be nothing but merely a biased report.

And to substantiate that, 35 people were appointed to that task force, civilian people beyond the Senate or beyond the legislature. There were 35 people appointed to this task force. Of the 35 people appointed, 33 were of Indian descent. What turned out to be, what we hoped to be recommendations for new Indian policy merely echoed the tribal sentiments. Testimony wasn't solicited from the white property owners that live on the reservations.

MS. HUBER. Excuse me. Mr. Reid, I take it that a number of people in your organization are in similar circumstances as yourself, owning land or leasing land or Indian reservations. Is that correct?

MR. REID. Yes, it is. I'll just give you a rough idea. I talk primarily of mine—you know, there are different circumstances. Some reservations are still closed. Some are totally controlled by the tribes. But the overwhelming majority of the 280 reservations in the United States have been open for homesteading.

Just to give you a quick brief example: since homesteading days on the Fort Peck Reservation, which I live in, was opened in 1913. Today, now, the ownership of the land is 55 percent deeded, owned by people other than Indians. And the population, according to the last census



was 9,600 white people, or other than Indian ancestry, and 3,600 Indian people.

So you can see that since the homestead days, American society has pretty well evolved into the reservations. And like I said, not all reservations are exactly the same as this. But I think the majority of them are.

MS. HUBER. Well, sir, if you could speak from your own experience and perhaps generalize that to those of your fellow members of your organization, what are the major concerns at this time of non-Indians who live and own land on Indian reservations?

MR. REID. It goes back to the American Indian Policy Review Commission. Out of that Commission, the recommendations set forth, they've been supported by the National Council for American Indians and other tribal groups. And they include the recommendation of sovereignty over all lands within borders of the reservations. They recommend jurisdiction over all persons and property within the confines of the reservation, taxation by the tribal government over all persons and property with the reservation, land use, zoning, planning, the total control over all waters that run over, around, under, and through the reservation.

The hunting and fishing rights are the main concerns that we have. And how they concern us in this organization is basically—we have no qualms when they talk about self-determination or control over their own destiny when it refers to the trust land that the Government holds, or the lands that the Government holds in trust for them, or the tribal lands that they own, the individual allotted land or the tribal lands. But when they start to talking about the deeded portions of the reservation, which is owned by people other than Indian ancestry, primarily that's where our concerns are.

MS. HUBER. What are your concerns? What do you think would happen to your interest if the tribes were to exercise that sort of control over the reservations?

MR. REID. Well, what causes us great concern is how we would fit in with a government to which we would have no right to participate. Now, these recommendations by the Policy Review Commission, they recommended this to the tribe. But they did not recommend us the right to participate in tribal government which would control the jurisdiction, which would control the taxation. And our basic feeling is that the Constitution of the United States guarantees us more than that. And that's basically the purpose of this organization: to bring attention to Congress to correct what we foresee as this problem.

Now, I would like to go back, that from the day of homesteading, from 1913, on our reservation—for approximately 40 or 50 years—the State law was the law of the land on the deeded portion of the reservation.

County government and State government was formed. And we participated in county government; we participated in State government,

had the same rights and privileges on this property as any other State citizen. These recommendations of the Federal Indian policy today and those that are supported by the tribal groups today seem to do away with that.

In other words, there would be no need for county government. I can't foresee that. Granted, we have heard, and I have seen different copies from tribal leaders and people that are in control today to say that you don't really mean to believe that we wouldn't take care of you people or that we would mistreat you.

I could trust any one man's—that I knew—individual position, but what happens after he's gone? You have no guarantees of that. And that's where our qualm is with this. We want guarantees by the Constitution. In other words, that the Government that we are subservient to, we have the right to participate through the electoral process to control whoever has that jurisdiction, etc.

MS. HUBER. Thank you. Mr. Nakawatase, what is the purpose of the Native Affairs Committee of the American Friends Service Committee?

MR. NAKAWATASE. Well, the American Friends Service Committee is a 62-year-old organization founded by members of the Society of Friends. And throughout that period of time, its purpose has been to seek ways in which Quaker beliefs in peaceful working out of conflicts through nonviolence and ways in which the roots of injustice can be struggled with. Those are the major basic premises of AFSC work.

And Native American concerns have been an ongoing part of the work of my organization since the 1940s, beginning first in California and including the Pacific Northwest, Washington State, as well as the State of Maine and the Plains States—primarily South Dakota.

MS. HUBER. Mr. Reid mentioned some of the concerns of the non-Indians living on or near Indian reservations. I understand that your committee has done some work in assessing those concerns in terms of non-Indians potentially affected by the land claims of the eastern Indian.

MR. NAKAWATASE. That's right.

MS. HUBER. Could you tell us something about your work regarding the claims of the Mashpee Indians in Massachusetts?

MR. NAKAWATASE. Early last year, we were asked by several residents, both Indian and non-Indian, to make an assessment with as much hard data as possible just to see how valid the claims were that were being made by non-Indians.

MS. HUBER. What were some of the fears or concerns that were being raised by the non-Indians at that time?

MR. NAKAWATASE. Well, basically that Mashpee was in the throes of an economic depression; that the economy of the town was grinding to a halt because of the land claims; that development industry was the core of the economic development of the town; and that all other businesses in the town were being seriously handicapped by the land claims.

We hired a consultant to research the economic impact of the land claims suits. We discovered some rather interesting things. We found, for example, that in some of the normal indicators of economic health, such as unemployment, there was no increase. There was no increase of any significance. Well, as a matter of fact, it was just evened out about which businesses—a number of businesses had failed as well as a number of business that started up since the land claims. And we uncovered only one foreclosure into the land claims specifically.

In fairness and in accuracy, it's clear that there was a serious hardship to the development industry. That is to say that Mashpee has been one of the last remaining, relatively undeveloped areas on Cape Cod.

But I think it also ought to be said that there are a lot of people, including a lot of non-Indians, that want to keep it that way. There have been serious questions raised as to the continuing validity of land development in Mashpee.

The suit happened to have helped raise some very, very basic questions about whether or not—for whom was the land going to be developed, who was being enriched by this. And I think it helps this particular time out for the development, this 2-1/2 year period has at least given some breathing room to that question. Whether that has been taken advantage of by town government and other people, I think is still unfortunately open for question.

MS. HUBER. However, these fears that had been expressed by the non-Indian community, did your organization see that in any way affecting the relations between Indians and non-Indians in the Cape Cod area?

MR. NAKAWATASE. Yes.

MS. HUBER. What sort of effect did you observe or what was brought to your attention?

MR. NAKAWATASE. I'm speaking now in the context of an organization that does not have an ongoing program. So we're not there on the scene every day. But clearly, it was pressure—for example, take away funding which had been traditionally given to the schools for Indian programs. There has been certainly a huge increase in the amount of ill will. I think that the stereotypes come up again in popular media, questions about Indians being super citizens, or people with privileges that non-Indians don't have. Those have come up again and again.

MS. HUBER. Were the findings of your committee summarized in a written report?

MR. NAKAWATASE. Yes, I have them available for you.

MS. HUBER. Mr. Chairman, may we receive that into the record at this point?

CHAIRMAN FLEMMING. Without objection, it will be received and placed in the record at this point.

MS. HUBER. Mr. Nakawatase, do you see a value in this sort of work of attempting to uncover which concerns have some basis, in fact, and which may not be grounded in reality?



MR. NAKAWATASE. Very much so. I mean, our organization takes it as a given that all persons have value, that all persons have some truth that needs to be uncovered. And I think when we're dealing with Indian and non-Indian relationships, we're dealing with what I consider to be an incredible amount of myth and speculation and fears.

I mean, serious accusations were made about what was happening to Mashpee. But I think a look at the record can say that most of those fears were not justified. I'm not saying that there aren't problems. Clearly, there are problems. Clearly, there are going to be different analyses about Indian treaties. For example, Mr. Reid and I are about 180 degrees apart.

MS. HUBER. Well now, you heard what Mr. Reid said a few minutes ago about his concerns and those of people in his position owning land on Indian reservations and the effect of tribal self-determination and exercise of sovereignty. Do you have any comments to make in regard to what he said?

MR. NAKAWATASE. Well, I don't think we have enough time.

MS. HUBER. If you could concisely give the high points?

MR. NAKAWATASE. Well, I just wanted to say that our work in areas like Mashpee, as well as ongoing work in Maine and South Dakota and in Washington State, indicate to us that one of the major premises that we believe is fundamental is the rights that Indians have under treaties and under agreements have to be taken as a given. That's not negotiable.

That those are not to be quantifiable or set aside or whatever or be subject to the majoritarian that I think is possible in various places. I think we are dealing in so many places with the political question. I mean, we are dealing with a group of people who are not going to send representatives to most of the places and who have in so many cases valuable resources—timberland resources in Maine, mineral resources in the plain States, fishing resources in the Northwest.

I think that as long as—I think one has to make a distinction between problems that can be worked out with different people in good will, which relate to differences of opinion, and some basic premises about the place and the status of Indians in American society. I think we have to, as I said, the right to be distinctive, the rights that have been marked out in treaties, not given, but simply noted in the treaties, have not been recognized.

MS. HUBER. Thank you. Mr. Reid, the situation that you described earlier in which you find yourself and other people find themselves, do you see the Federal Government as having any role in creating this situation?

MR. REID. You look back primarily to the reservations of the West, and this gentlemen is talking about treaties. And there is no qualm with the treaties; the treaties are there. They are a fact; you can't argue with them. They placed the Indian on the reservation by the treaty and we accept that. But that same Congress also enticed settle-

ment by the Allotment and Homestead Act. And that is already an alteration of the basic treaty. And that's the whole point of the thing.

When the Indian groups or the Federal Government or the Bureau of Indian Affairs talks about the reservations, they talk about the reservations as a whole, the original boundaries. They claim any lands that are within the borders of the original boundaries. But basically, the Homestead Law has already altered the treaties.

The concern that's being voiced in America today is that we're out to terminate the treaties. That's not the case. I think the Federal Government has to reexamine Federal Indian policy. But the treaties basically have already been altered. And we talk about the treaty's rights being the supreme right granted for them. But wasn't the Constitution of the United States written well before any treaty?

MS. HUBER. Well, I believe that there were treaties both before and after the Constitution, but—

MR. REID. Right. The treaties today, the treaties that we're living under today, the Constitution was written ahead of that. But you're talking about the involvement of the Federal Government. Sure, the Federal Government placed two people in the same confines under various, under different ground rules. They created the conflict. And basically the only thing we're asking in this argument is they've got to solve the problem.

MS. HUBER. Well, what actions do you think the Federal Government could or should take at this time in regard to policy towards Indian tribes and non-Indians?

MR. REID. There's maybe three. And this might be summing it up in awful broad categories. But basically there are three lines of thinking. There is the sovereignty thinking of the tribes; there's termination thinking on the opposite extreme; and there's the middle of the road approach which puts it back—or which put it back to where it was when homesteading in fact started.

And what we look for as far as our rights is when the homesteading on the reservations was allowed, what was the intent of the Congress at that time? I think you've got to go back and look at that. Basically, the intent was to set up county, State government, and State laws would apply to the reservations. That is basically what this organization supports. That was introduced in Congress in the last session—in House Bill 9950.

So you've got three alternatives. Either the Congress of the United States is going to say okay, the tribes are sovereign, or termination—those are the two extremes on both sides. And there's a large gap in between that. But when you've got something in between—self-determination of the tribe, which is what they talk about, which we could grant. But when they talk self-determination, then all of a sudden, they're putting their arm around me and the people involved in this organization.

MS. HUBER. Well, what is your organization's position as to whether Indian tribes have any authority, either civilly or criminally, over non-Indian residents of Indian reservations?

MR. REID. Basically that's—there is one major reason that we organized, so that we wouldn't fall under the arm of the tribal government as far as jurisdiction goes. Now, we talk about the original intent of Congress, the *Oliphant* case was argued in a criminal case in the State of Washington. And that basically was that the white man, and I would have to acknowledge to you that the white man was probably guilty of what he was doing.

And you pick probably, from what I understand, one of the more undesirable of the white community. And he committed a crime. He was picked up by the tribal police force and was taken to the tribal jail and prosecuted in the tribal court system. We did not defend the man and what he did. We defended the principle, basically, in that case. And that Supreme Court ruled 6-3 that the Congress of the United States never intended the tribes to have jurisdiction over anybody other than their own members or land.

MS. HUBER. *Oliphant* was a criminal case. What is your organization's position as to the authority of Indian tribes to exercise civil jurisdiction, zoning authority, and the like over land and property possessed by non-Indians residing on Indian reservations?

MR. REID. Jurisdiction is jurisdiction. To me it doesn't make any difference. We are opposed to any control over a government in which we cannot participate. In that case, we are opposed to the civil jurisdiction.

I realize that under the circumstances, when you go to the Supreme Court and you found that out, very expensively, that you only get one little narrow decision out of that. So I would assume that we'll have to go back to court over the civil aspect of it also. But I would also assume, and our lawyers are assuming that we will—a favorable decision will be granted on that also.

MS. HUBER. Thank you. Mr. Chairman, I have no further questions at this time.

CHAIRMAN FLEMMING. Commissioner Freeman?

COMMISSIONER FREEMAN. Mr. Reid, I want to see if I can understand your positions with respect to the legal points questioned here. Under the Homestead Act and prior to the Homestead Act, there was a treaty in which land was set out and allocated to Indian tribes as being owned by those tribes. Following that time, officials of the Federal Government, as a result of a law passed by Congress, in derogation of the rights to ownership of the tribe, said to individuals: you can go out and move into this land and it will become yours.

And the position of your organization is that since there was sort of a color of law, a color of title, that this law superseded the treaty rights and the ownership at that time. Is that the position of your organization?



MR. REID. Our feeling is that the Congress, after the treaty was written, altered the treaty, yes, by the Homestead Law. The Congress of the United States, as far as Federal Indian policy, is where the decision has to come in our interpretation. And there has been a case, we don't follow all the way through with that, but a diminishment-type case—in other words, what did homesteading do? That is known as the *Rosebud* case out of the State of South Dakota, and that case was affirmative in our opinion that homesteading did, in fact, diminish the size of the reservation.

COMMISSIONER FREEMAN. And it is your position that the treaty that the government had with the Indian Nations was a lesser value than other treaties that this government has?

MR. REID. No, I don't feel that. The organization doesn't. I have no qualms and the organization has no qualms with the Federal Government in the treaties that they hold with the Indians as long as it pertains to the Indian and his property. But, while the homesteading altered the reservations that are known today, that treaty can no longer be—the treaty rights cannot go on that way.

COMMISSIONER FREEMAN. Has your organization taken the position that this statute, to the extent that it purported to take away basic property rights, was unconstitutional?

MR. REID. Would you repeat that please?

COMMISSIONER FREEMAN. Has your organization considered that, to the extent that any Homestead Law purported to take away property rights of the Indians under the treaty, that to that extent the law was unconstitutional from the beginning; and that any rights that may have been asserted thereafter were subject to that and then void?

MR. REID. No, we don't—if I understand the question. We do not believe that the homesteading law was unconstitutional, if that's the question.

COMMISSIONER FREEMAN. Have your attorneys evaluated this?

MR. REID. Okay. I am not an attorney; I can't answer that.

COMMISSIONER FREEMAN. What I'm suggesting is that if it was void from the beginning then there would have been nothing to build on and to make it even less void.

MR. REID. Okay, when we're talking—I get your gist now. I would like to point out something to you—that the titles we have—and I have an abstract of an original Indian allotment that went through the process where the Indian applied for a patent. He was issued a patent. When he was issued a patent by the United States Government, was to have—the wording is “to have and to hold together with all rights, privileges, and immunities of whatsoever nature...” when you go through that “to have and to hold, together with all rights, privileges and immunities of whatsoever nature,” that deed was signed by the President of the United States.

Now, I assume that if the President of the United States' signature is no good, then I don't think this country is much good, and I realize

by the same token, that the President of the United States signed the treaties with the Indians.

We have no qualms with that. But the President of the United States also guarantees us the deed. I think the deed that we hold on the reservation probably is a sounder deed than anybody off the reservation because it's guaranteed by his signature. And I think if we can go back to the point where we can dismiss the signature of the President of the United States, then I think we're in a lot worse trouble than the Indian/white conflict we are in today.

COMMISSIONER FREEMAN. Well, it is at best a complex situation.

MR. REID. I agree.

COMMISSIONER FREEMAN. Well, is it possible, not in this present Supreme Court, but that maybe some other Supreme Court might say that all of the statutes that purported to abrogate the rights are unconstitutional, and then all of the land that originally belonged to the Indians now vests with the Indians, and everybody else should leave it?

MR. REID. I shouldn't try to guess what they may do.

COMMISSIONER FREEMAN. Thank you. Just speculative.

[General laughter.]

MR. REID. We've found out anything is almost possible.

CHAIRMAN FLEMMING. Commissioner Horn?

VICE CHAIRMAN HORN. No questions.

CHAIRMAN FLEMMING. Commissioner Ruiz.

COMMISSIONER RUIZ. I was thinking about real estate law. It is your contention that that a second title signed by the President supercedes the first title signed by the President. Is that your theory?

MR. REID. Well, if the signature is good the first time around, I would assume that his signature would have to be good the second time around.

COMMISSIONER RUIZ. And if the President, the third time, came and said your land belonged to Podunk, that would be the third signature, and you wouldn't be entitled to any court action on it because it contained the signature of the President the third time?

MR. REID. I would have to assume that that would be the case.

COMMISSIONER RUIZ. Under your theory?

MR. REID. Right. But basically we're hoping that people will look at the circumstances now. I would like to make one point that is pertinent to this thing. And I've read, and I've had it thrown at me, that the Indian people did not want the Allotment Act and did not want the Homestead Act.

That may be the case in some instances, but on the Fort Peck Reservation, if you look in the *Federal Register*, it's dated 1908 but I've got a copy that I will make available later, that when the bill was introduced in Congress to allot the Indians the land—and this pertains strictly to the Fort Peck Reservation that I live on today—and then to open the area to settlement, the man that introduced the bill in testimony stated that there was an election held on the Fort Peck

Reservation; the adult Indians on the reservation voted 95 percent that they wanted the Allotment Act, and they wanted the Homestead Act.

COMMISSIONER RUIZ. Getting back to my question, once the property has left the government the first time, it's your theory that the same property can leave the government a second time. Is that your theory?

MR. REID. Well, no, I don't agree with that in the case that you purported before, all I was acknowledging is that the Congress of the United States, and in the case that the President has to sign any legislation before Congress, if Congress would legislate that that land is no longer mine, I assume then that's going to be the case. I'm not saying that that's right and whether it's wrong. I'm not saying that that's right. I'm just acknowledging that it could happen.

COMMISSIONER RUIZ. Is it the claim of the Interstate Congress that before the year 1913 this land was not Indian land, before the 1913 act under which you went in?

MR. REID. No.

COMMISSIONER RUIZ. It's not the claim that it wasn't Indian land?

MR. REID. No, the treaty is evident of that.

COMMISSIONER RUIZ. Do you know whether the Federal Government paid the Indians for this land on which you are homesteading?

MR. REID. The Federal Government did not. The settler or the homesteader on the reservation lands paid—

COMMISSIONER RUIZ. The government?

MR. REID. —paid the government. The government held it in trust. And then that money was turned to the tribe at some later date, I'm not sure what the date was. But there is a difference between homesteading on a reservation and homesteading off the reservation. I don't think they paid for the land off. They approved the claim. But, back in 1913, I'm not sure what it was. I think it was a dollar and maybe a quarter an acre or \$1.50 an acre at that time.

COMMISSIONER RUIZ. Is that what you paid for it?

MR. REID. That's what the homesteading land, the people who were homesteading, paid for it at that time.

COMMISSIONER RUIZ. That's what you paid for it?

MR. REID. I didn't, no.

COMMISSIONER RUIZ. Your grandfather paid for it?

MR. REID. Yes, and some of the land that we have—okay, I'm not saying that that's exactly what they paid for it. In 1913 that's—it's somewhere in that proximity, \$1.25 or \$1.50 an acre, as I recall. I could look it up and find it for you.

COMMISSIONER RUIZ. Has the Interstate Congress looked into the question of having the government pay the fair market value of your land to you?

MR. REID. Okay, that's been a proposition that has been put forth. And I wouldn't say, you know, that I have the authority to say that the organization would or wouldn't; it's one that has been suggested, we've talked about it in different places. There would be some support



for it. And I'm sure there would be some objections to it, basically how the organization would—I don't know. My own personal feeling is that I do not believe that that is a solution to the problem.

And that, the simple fact—the reservation as it exists today and the property that we hold today, if that's treaty, and if I have to give up my land, I'm going to have to ask for more than that. I'm going to ask that we look at treaties beyond that. I think you can go back in history and look at just about any area in the United States. That was also treaty. So if they're going to have to give it back—are we going to give America back to the Indians? Now I don't know. I don't think it's feasibly possible.

When you talk about the government buying out, in cases that I know, the Fort Peck Reservoir, which is west of us off the reservation, the government bought that land to make a reservoir. But what it basically turned out to be was a government condemnation. I don't think people were given justice or satisfactory monetary value. Because of that, I would be cautious in that approach.

Now, one other reason that I would be cautious of that, if we were talking about the Indian people of today, if we were talking about the full-blood Indians or maybe Indians of 50 percent blood and nothing less, then I think maybe that theory would have more possibilities. But the majority of the Indians today, I think you will find, are 1/4 and less in a lot of cases. Now, some of the reservations, the Flathead Reservation in Montana has an Indian registered on its role who is 1/64 Indian. So how do you turn history back? I don't know.

If it was the full-blood Indians, by all means, you've got to honor, and maybe you could go to the 50 percent blood. But when you starting to talk minority blood quantum, and saying that I'm Indian, where in fact they're 1/8 or 1/16 more Indian than I am and claim all the rights and don't claim to be anything else, then I think that solution there suggests—I just think it would be very unworkable.

COMMISSIONER RUIZ. Now, you've mentioned that it has been suggested that fair market value of your land might possibly be paid by the Federal Government, do you have an opinion as to what the fair market value of your land is now?

MR. REID. I am not in the market to sell. And I found out that anytime anybody quizzes you on market value of your resources, unless you're willing to have it condemned, you had best not suggest what you think the value is.

COMMISSIONER RUIZ. And you're not willing to have your land condemned?

MR. REID. At this time, no.

CHAIRMAN FLEMMING. Commissioner Saltzman?

COMMISSIONER SALTZMAN. Mr. Reid, your land, you said, is on the reservation?

MR. REID. It's within the borders of the reservation.

COMMISSIONER SALTZMAN. Do you receive services of the government that the Indians on the reservation do not receive? Do you come under different jurisdiction than the Indians who live on the reservation?

MR. REID. We are, right now, in kind of a mix-mess as far as the jurisdiction goes. There is State jurisdiction on the deeded portion as it pertains to the white man. In other words, if a white man breaks into my home or he goes to county—or if it's in the city, he goes to county, State court.

COMMISSIONER SALTZMAN. You can call the regular police service?

MR. REID. Right. Now where the problem is today—and that also was the, from homesteading for approximately 50 years on the reservation. There is some disagreement on this. But we felt in relative harmony in that area. That law also applied to the Indians from homesteading for approximately 50 years. The law had been changed. And since that was changed, basically what the law states now is that if an Indian is on deeded property on the reservation, he cannot be taken to the city, county, or—he has to be turned over to the tribal authorities.

And basically when that law changed, and when the Indian government started taking advantage of that, that's where the hostility grew. And this is the civil rights part of it. Your're talking about the racial relations with people—before that, if I caught somebody in my house, I didn't have to ask any questions. I could call the law enforcement agency and they'd come and get him. And due process was, you know, it would go through the court system. But today, now—

COMMISSIONER SALTZMAN. How about—

MR. REID. Excuse me. I'd like to make this one point. We're worried about racial tensions and what happens in this thing. And I'd like to show you how this policy is doing just what it shouldn't do. If I catch somebody in my house, the first question I have to ask is, "Are you Indian or are you white?" And automatically, that sets the tone that there is racial motivations. And basically, there are none.

Yet when you have to ask that now, they go the tribal court system, the tribal court system is not subservient to me. They do not reflect my wishes. And consequently, they can come back and thumb their nose at me and I can't do anything about it. So there's where this policy, as it is today, brings up the racial question. And it's a question that we didn't basically have before. But it's becoming more and more evident every day.

COMMISSIONER SALTZMAN. How about other governmental services, hospital care, education?

MR. REID. We have our own hospital system, our own medical system.

COMMISSIONER SALTZMAN. Who is "we?"

MR. REID. I'm talking about the white community or the city-county, the white—

COMMISSIONER SALTZMAN. I see. So you're included in all the government services of the city-county?

MR. REID. Right. Then the tribal governments have their own—

COMMISSIONER SALTZMAN. Thank you.

MR. REID. —system. And if I could reiterate one point here, here again is where part of the problem is. In America today, where you would have a group of citizens that are receiving the benefits of the government strictly because of race—in other words, if you are Indian, you are entitled to certain things. One of the things is a perpetual money bank provided to the lawyers that sue us and are paid for with taxpayers' money, which we support in our own small way. Then we have to turn around and defend ourselves with money that we have to dig out of our own pockets. We're fighting ourselves. And here again is where animosity builds.

CHAIRMAN FLEMMING. Counsel has another question.

MS. HUBER. Mr. Reid, if I understood the whole tenor of your question correctly, what you're saying, at least in your experience, there was a period of 50 years or so that was relatively free of tension between Indians and non-Indians?

MR. REID. I won't say it was absolutely free. There are problems. When you put two people together and after they look at one another, they're going to have some disagreements. We have them definitely just like any other town did. But it really wasn't necessarily because you're Indian or you're white. And it wasn't with the intensity that we're starting to build today.

MS. HUBER. And you see that as occasioned by the tribes' move towards self-determination, exercising jurisdiction over reservation land and those who find themselves within the boundaries of the reservation?

MR. REID. It basically isn't because they're attempting this. It's because they're attempting it with the Federal Government's blessings and money. And there again is where we're opposed.

MS. HUBER. But you see this development as causing the tension and in a sense providing an impetus for the formation of your organization?

MR. REID. Definitely.

MS. HUBER. Mr. Reid, I understand that some months ago you and some other officers of the Interstate Congress appeared and spoke in a meeting of the National Congress of American Indians. Is that correct?

MR. REID. Yes.

MS. HUBER. What led to this meeting; what was the purpose in beginning this sort of dialogue?

MR. REID. Well, I would hope it's to try to find some middle of the road approach, something that both of us could live with, and acknowledge, you know, what the past is—the treaties with the Indians and the Homestead Act, what significance it has to both of us, to see whether we couldn't accept the middle of road, something that we



could work together legislatively to end this problem. There's nothing that I'd like better.

Like I said, when we started this organization, we basically—we have no idea what the Federal Government is going to do. Maybe they're going to, in fact, throw us out, I don't know. But if that's the case, then they'd better get it done. We don't want to live for the next 20, 30 years bickering and fighting with our neighbor. Things are tense. And it's an uneasiness that it has put under. We don't feel that we're responsible for it. We are third generation down from the decisions.

And, I suggested, you know, at the National Congress of American Indians, if you're going to lay blame, you can't even lay blame at the Congress. Well, you can with the Congress today because of their inaction in either direction to some degree. But if you're going to lay the true blame to the reservation problems of the West, you've got to the homestead days and the Congress and the Indian leaders and the white people that made the decisions at that time. There is where the true blame for that lies.

Now, we haven't talked much—other than the gentleman here—about the Indian land claims. They're up against the same thing. They've owned this thing for years and years and years. And because of the 1799 Intercourse Act, their titles are clouded. I've talked to the people, in fact, I attended a meeting in Mashpee, Massachusetts. And I could understand their concerns maybe more than the gentleman to my left can. The people that hurt aren't necessarily the businessmen. It's the retired people that are sick and have to move away. I think that can be substantiated through Mashpee.

I'm not that familiar with the case. But I think there have been more troubles there than what he indicates. But there again on the East Coast it isn't the problem that—it isn't the fault of the people that own the property. The fault lay with the government at that time, that they did not require the consent of that tribe.

There again, it's Congress' problem. All we've basically said in this thing is we've got to have the answer somewhere, some way. The Federal Government created the problem. They put two people in the West, and the problems that we're in today, and only they can correct it.

MS. HUBER. Mr. Nakawatase, would you like to just comment briefly on your view of what role the Federal Government had in creating this situation, and what steps the Federal Government could or should take at this time?

MR. NAKAWATASE. I think there are some grounds for agreement here, at least, insofar as—I think, though, that one major premise that Mr. Reid is talking about, I think he's essentially blaming the victims, I think he's saying that everything is okay. That's the gist of what I thought he said. Until Native Americans became aggressive in asserting their rights and pushing the status under treaty and all those things—I think that's just wrong. I mean, that's wrong. I think that those valida-

tion of rights, that struggle for rights, it's very heartening in this country as a proud history.

And I really think that for us, as an organization, the issue is a political one and it's a legal one. I don't think there is any doubt about that. But we must remember too that it's more than that; there are millions on one side and, two, on the other, that there were commitments made by this government to the Indian people. And I don't care what you call it; you can call it treaty, you can call it covenants, agreements, but they were made. And they laid out specific, particular responsibilities. I think there are reasonable questions about it. But I think that, as I said before, has to be taken as a given.

Getting to the particulars about Mashpee, in our report we acknowledge quite clearly that there were people who were having problems selling their house because of a clouded title. We didn't try to say that there are no problems. What we trying to say is it seems to us that in terms of the overall economic health of the community, there was no disaster. That there were some people making considerable profits on land development who are not making them anymore. And as long as the land suit is in court, they won't be.

And they know that and the Indians know that. And the Indians know that they know that. That, to me, is a question of another dimension than whether in, I think, using all the means at their disposal and as their rights as Americans citizens the Wampanoag's file a suit in court to restore land that they feel belongs to them. I just can hardly begin to describe the gap of communication here in talking about it. I think that's one of the problems we've been trying to deal with, that there are enormous gaps. There are in both Maine and Mashpee. I think there are not only things that people don't know, but things that people know that just aren't so.

And we've been—as I said, the town government, the State government, has subjected the respective population to all kinds of innuendos and discussions about whether or not the suits were valid or whether the Indians really have a legal claim. Take Maine, for example. You have the highest legal official in that State saying that Indians have no legal case. Well, there are at least two Federal courts that will take exception to that, just in terms of having a case, and whether there was any legal validity.

I mean, that has set a tone that I think has been extremely dangerous. And in terms of Maine and Mashpee, I mean, I don't think that the people in either of those places or anywhere else in the East, or in the West for that matter, I don't think there are people—I do think that there are people who have profited, politically or economically, from keeping these tensions high, who have I think made it very difficult to affect the posture that says: you live here and I live here; we come from different places; we have different views of the world, perhaps, but we have to live together somehow.

And I think that it's a responsibility on all parts. I think the Federal Government, to the extent that I find it culpable, it's culpable to the extent that the government asserts strongly enough its responsibilities under the treaties.

CHAIRMAN FLEMMING. Thank you. Thank you very, very much. And I appreciate the testimony from both of the witnesses. It has been very helpful. We will move on now to the next panel.

Counsel will call the next witnesses.

Ms. HUBER. Yes. Ms. Veronica Murdock, Mr. Kenneth Black, and Mr. Samuel Pete, please come forward.

[Veronica Murdock, Kenneth Black, and Samuel Pete were sworn.]

**TESTIMONY OF VERONICA MURDOCK, PRESIDENT, NATIONAL CONGRESS OF AMERICAN INDIANS; KENNETH BLACK, EXECUTIVE DIRECTOR, NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION; AND SAMUEL PETE, NAVAJO NATION.**

Ms. HUBER. Beginning with Ms. Murdock, could you each please identify yourselves, the tribes you belong to and also your organization affiliation and the position?

Ms. MURDOCK. My name is Veronica Murdock, and I'm a Mohave from the Colorado River Indian Reservation in Parker, Arizona, and I'm president of the National Congress of American Indians.

MR. PETE. I'm Samuel Pete with the Navajo Nation.

MR. BLACK. I'm Kenneth Black, representing Navajo Tribal Chairman Peter McDonald, Window Rock, Arizona.

Ms. HUBER. I'd like to ask each of you to respond to this. This Commission has received testimony in earlier hearings in other parts of the country and also earlier today that this seems to be a period in which Indians and non-Indians find themselves in substantial conflict. Beginning with Ms. Murdock, could you please give us your analysis of the issues of conflict between Indians and non-Indians at this time?

Ms. MURDOCK. Well, certainly there are. I don't think that, though, it dates back to any particular time. I think it goes back to when Columbus came across the waters and came to the East and landed on our eastern seaboard. But I think there hasn't been the opportunity to address the issues and the problems that the Indians had. Perhaps if something like this has been available back in those times, many of the problems would be solved, and the treaties that the tribes negotiated in good faith would be upheld, and the amount of land that has been lost over the past 200 years wouldn't be as great as it is. I believe it is some hundred million acres.

So I think that even though the conflicts may seem more piercing today because of the press, and the legislators are reacting to that, and Indians reacting to non-Indians on the reservation, and the fact that tribes are becoming more assertive in working towards improving themselves as a people and protecting their rights, their civil rights, their human rights, and just all protection of their lands, of their



waters, beginning to use those resources, beginning to develop those natural resources, that I guess this is something that is very hard for me to deal with as well, because the reservation that I'm from, I've lived there all my life and raised there. My family has been there, goes back for centuries, hundreds and thousands of years.

So when I hear a third-generation person speaking up here about the misgivings that he has and the misgivings he feels he has suffered, you know, he hasn't suffered at all in my estimation. But I feel that it is true that we are having these conflicts, and I think that many of them can be worked out. Tribes are independent, sovereign Nations. And they have the ability to sit down and deal with people on that basis.

I think that if that was recognized by not only the Federal Government, by States, and by people that choose to reside near or on reservations, I think everybody would be much better off. I think that tribes can do that, and they've proven that they can do that.

I've heard many statements made here that have a tendency to lean one way. And I think that it's taking tribes on an individual basis rather than putting them all in the melting pot. And that's always been a concept in American society is the melting pot concept. Well, Indians don't melt so easily.

And we've managed to maintain and stay alive and survive, when we have our governments. You know, I invite any one of you to come out to my reservation, the Colorado River Reservation, to the Navajo Reservation, to Kenneth Black's tribe, to see how they operate as governmental units, meeting with their own people, their judicial system, their law and order systems.

You can get treated well there. The judge, in comparison to the community in my area, has a master's degree, she's had any amount of training in Indian law, all law phases as compared, as compared to the county magistrate, who is a housewife, and that's certainly not giving a reflection on that. But it just goes to show you that in many circumstances, much of the testimony that I'm sure you get is different, and so I ask that you remain with that open mind, that the tribes are separate and distinct.

And I think this has always been a major problem in that we fit them into areas where we want one thing to be applicable to all people, and each reservation is in their own phase of development. You won't find a lot of the conflicts because many of the reservations have no resources to develop. And you know, they have their human resource development on their own reservations. So they're all at different phases.

MS. HUBER. Ms. Murdock, I'd like to ask you and also Mr. Black for your comments. Both of you are members of your own tribes. But as well, you are national officers of Indian organization representing a number of tribes. What is the role of your national organizations at this time in relation to these issues of conflict between Indians and non-Indians?

MS. MURDOCK. Well, the organization of National Congress of American Indians was started 35 years ago. The Indian people of the United States felt that they should draw together for the protection of their rights and their treaties or agreements with the United States and to promote general welfare, common welfare of the American Indian people. And they have existed for 35 years.

They have been through various phases of dealing with the Federal Government and other entities, and it is an organization that requires the tribal governing body to pass resolutions to join. That is one category of membership. The other category of membership is individual membership, individual tribal members. My tribe belongs as a tribal nation; I belong as an individual member. And I have a vote; my tribe has votes. And there is also associate Indian organizations, student representation, and also associate membership. So it has quite a wide range of membership in the organization.

MS. HUBER. Mr. Black, what is the role of the National Tribal Chairmen's Association at this time in addressing these issues of conflict between Indians?

MR. BLACK. The National Tribal Chairmen's Association is one of the largest Indian tribal organizations. The constituency of the National Tribal Chairmen's is leaders or chairmen of federally-recognized tribes in our country. The concerns of the National Tribal Chairmen's Association are trust responsibilities the Federal Government has with the Indian tribes. And it is imperative that the Federal Government through its agencies secure and protect Indian-owned natural resources for its owners, not equate these resources with public domain; protect them from exploitation, not prescribe public interest in the Indian-owned natural resources.

For the Federal Government to do otherwise would be contrary to the concept of self-determination. The Federal Government through its judiciary should reassert its jurisdiction over legal issues which arise relative to Indian trust lands and their resources. We view the government's trust responsibilities as threefold. First, there is a special relationship derived from the Constitution of the United States Government, various treaties, statutes of the United States which recognizes tribal sovereignty.

Secondly, the trust responsibility of the United States should emphasize the protection of tribal assets and allow the Indian owners to assume a major role in the management of their funds and their natural resources. We find that if our inherent rights are affected—fishing, water, land, hunting—that States, interested parties, and other groups attempt to circumvent the law or legislate their intent to the detriment of our people and our tribes. We have long-standing agreements which give them their inherent rights of that which we refer to. In conclusion, we have found that the States have historically excluded our people from community services that you and your people take for granted, either through ignorance, intent, or the political system requires exclusion because of our small population.



Thirdly, the Federal Government should ensure that all agencies provide these services and means by which the tribes can enhance the quality of living within their reservations and their respective communities.

Let us now address the purpose of this hearing, that of collecting information concerning legal developments constituting discrimination or denial of equal protection of the laws under the Constitution because of color, race, religion, sex, or national origin.

We find that Indian individuals in State courts receive sentences more harsh than their fellow citizens. We find that they are incarcerated more easily and readily and serve full terms more often than their counterparts in various areas of our country. We find that we have not been participating in the services that citizens of our country have been participating in. We now request that participation. We now assert the request for that participation. We have served our country in its armed forces. We have served it in other ways. We cannot leave; we shall not leave. And it behooves us to protect what we have left.

MS. HUBER. Thank you. Mr. Pete, one of the points that Mr. Black made is a goal of his organization was the protection of Indian tribal resources. We understand, is this not correct, that the Navajo Nation has been involved in the creation of a national organization called the Council for Energy Resources Tribes [CERT]; is that correct?

MR. PETE. That is correct. And I'd like to preface by saying that I would hope that today's testimonies, statements that are being made today, and whatever your recommendations are, your report to the President of the United States and Congress, that something be done with it. We hope that it will be put to use and not shelved as has been other reports, other recommendations. I'm glad that I am participating in this hearing today. The creation of CERT—

MS. HUBER. Could you tell us what circumstances or need led to the founding of CERT?

MR. PETE. Well, I think that the reasons for the creation of CERT was that the Navajo Nation and other tribes did not have the capability, the technology, to develop its resources so that the returns would be the maximum. There were leases that were unconscionable that needed to be renegotiated. We felt that if the United States Government has the trust responsibility to provide the technical services, but we found out that as far as the Navajo Nation is concerned, we started to renegotiate a lease.

We wanted the technical assistance from the United States, but we found out that the Department of Interior had one geologist, and we didn't know where else to turn but to create and develop an organization that would be unified in its approach to the Federal Government, its trustee, to get the technical assistance, the funding to renegotiate some of these unconscionable leases, and be in a position to have our people trained in hydrology, geology, and to be able to help ourselves.



This is the basic reason why the CERT was created. But it was very ironic that the American public portrayed CERT as millionaires reaping the riches of the natural resources. Indian nations are depicted as landmongers, taking back the whole Eastern United States, as terrorists who are holding the entire Southwest hostage with their water rights and their energy resources.

This is not accurate information. We are saddened to say that many Americans believe that—believe what they are reading. We are more saddened to know that the American public won't get to read the facts of Indian life. The facts of the matter are that 48 percent of the Indians on reservations are living below the poverty level. Fifty-five percent of Indian housing on reservations is inadequate. Fifty-eight percent of Indian children on reservations drop out of school before they complete the sixth grade. Average unemployment on the reservation is over 40 percent. Life expectancy of the average American Indian is 10 years less than other Americans.

Does this sound like the profile of a rich nation where every Indian is a millionaire? Well, we are rich in a sense. We have more bureaucrats per capita probably than anyone else; bureaucrats to watch over our poverty, supervise our unemployment and our alcoholism, review our tribal council resolutions and grade it A, B, or C, manipulate our elections, and negotiate away our mineral rights.

And so I hope that this is how people would look at our problems, instead of being regarded as rich Indian Nations.

MS. HUBER. Thank you. Ms. Murdock, were you here during the testimony of the previous panel?

MS. MURDOCK. Yes.

MS. HUBER. Would you care to comment on anything you heard in the last panel as to the issues of conflict between tribes and non-Indians, and what you see as being the issues that must be addressed at this time?

MS. MURDOCK. Well, the Indian people have really suffered in many of the last few decisions that have been made in the Supreme Court; the *Oliphant* decision is one that takes away the tribes' right to have jurisdiction over their reservations.

And Mr. Reid, of course, has just the opposite view. And that's, I guess as he pointed out, also the trouble with a lot of the decisions that are made. It just all depends on the interpretation and whether or not people are going to honor the supreme law of the land.

In my hometown and I know in all the other Indian reservations that the situations differ. But on one hand where he says the law enforcement on the reservations are second class to the non-Indian law and order and court systems is completely wrong.

I feel that Indian courts and Indian law and order systems can hold their own. My point would be that law and order system on my reservation—the policemen are trained to a degree higher than our State Department of Public Service program. They receive more hours, and

yet we have many, many problems with the State in getting our tribal police certified, and I guess it's simply because of the color of their skin.

And so, you know, in many cases that he cited I think that we could probably go back and take them one by one and we could rebut those statements. But as far as the 14th amendment and equal rights for everyone, the Indians are not a special interest group. They are written into the Constitution of the United States, and there was a reason for that because they were the owners of this land, and they were dealt with as sovereign nations.

And it's also written clearly in the *Congressional Record* how many of the transactions have taken place. And as I've said, the Indians never had a forum to address their problems throughout the years because it was always the U.S. Government representing their interest with Indian tribes and never taking into consideration the tribes' interest and what the tribe should do and what the tribe should retain as far as their rights. And I think that goes to show that when the War Department was put in charge of Indian affairs exactly what the attitude of the United States was with regard to the Indian people.

And the fact that our interest have always been compromised, our interests have constantly been compromised because nobody has anything else to give up. It's all been a give and take process, where the Indians give and the non-Indians take. And I don't know what Mr. Reid has to negotiate with Indian tribes. It seems like everything that he wants is his own self-interest as well. And we as Indian people here are to protect the interest of the Indian people and to see that the compromises that anyone speaks of are not going to further erode the rights of Indian people, their rights to water, their rights to live, their rights to survive, and their rights to their land, and their rights to whatever that may be.

As far as Federal funding, in my hometown the town receives as much Federal funding as the tribe does. We have interests—the town has leased an airport from the tribe, land for an airport. And in the best interest of the community, the tribe gave them a very, very good lease on the land. They developed it totally with Federal funds. Now the tribe has a portion of that lease and every penny that's gone into that development has been tribal money. I pay taxes just like everyone.

And if this Commission, you know, would want to chalk up just exactly what Indians have paid in taxes, in land, in the loss of rights and the loss of lives, in imprisonment, they can chalk up the record and I'm sure that the tribes would come out far ahead than what other people have given up for the right to the land, right to use the water, the right to clean air.

MS. HUBER. Thank you. Both Mr. Pete and Mr. Black discussed the current attempt of tribes to gain control over their natural and energy resources, fishing rights, economic resources of one sort or another. I'd like to ask Mr. Pete and then Mr. Black, do you see any value to a



process of negotiation in addressing conflict over those resources that are assessed by Indian tribes?

MR. PETE. I think as Veronica has stated here that there's really nothing to negotiate. What little we have left is nonnegotiable. The water rights, the land base that we have, mineral resources is all we've got to make a life for our children. And it just doesn't make sense to negotiate or give those away through negotiation. I think that the right to water, mineral resources are there.

I'd like to address the water rights, for instance, to make the picture a lot clearer. We have *Winter v. U.S.*, 72 years old; *Arizona v. California*, which is 16 years old. We have those rights, those water rights. And we would like to be in a position to develop and put to use what is rightfully ours. However, there is currently an attempt by the State of New Mexico to quantify our water rights.

As we know, in State courts we have judges who are elected by the public that are hearing our case. And we feel that that forum is not going to be impartial. And I think that what is needed here is for the United States Government to create a Federal water court that would not be able to make decisions based on the demands of the electorate. I think that is what we are asking for as far as water is concerned. The United States Government stands by. We need its help to develop our water rights.

The Navajo Nation, being the largest Indian Nation, cannot afford to expend its little resources to develop this water right. The Federal Government needs to respond. And it did just 1962 onward; the Navajo Indian Irrigation Project was created. But there was a diversion down the Rio Grande Valley that was outlined in the bill.

The act also provided in the same bill that there would be 110,000 acres of land to be made irrigable. I would like for you to know that the San Juan Tribal Diversion, the diversion of water down the Rio Grande has been completed. The people are enjoying farming, boating, fishing, and playing in our waters, while the Navajo Indian Irrigation Project which is the second part of the bill is less than 2/3 complete, or 1/4 complete. And so we have those problems where the Federal Government is not addressing the needs of the Navajo people as far as its efforts to develop its water resources. I can go on like that, and I think that—in summary, I think that what little we have, it can't be negotiated.

MS. HUBER. Do you have anything to add to Mr. Pete's remarks on whether negotiation is a viable process?

MR. BLACK. I'd like to make two comments, lest the Commission receive the mistaken impression that Indians don't pay taxes. I can prove that one year I paid more taxes than President Nixon. And I've been paying them for—since I was about 17 or 18 years old.

Secondly, the other comment that I wanted to make was that I don't know of a single tribe in the United States who's federally recognized that did want to divide up their land in little plots. It wasn't in their



philosophy. They had the philosophy that God had made enough land for all of us, and you showed us how to divide it. We had assumed that water was indivisible and that God had created enough water for all of us, and you are now showing us how to divide water.

I am waiting, and I am the age where I have seen many things occur to my people. I am beginning to wonder when the day shall come when you will show us how to divide air and sell it back to us. We are not asking for all of the water. We are not asking that—I think what these people are requesting is that they just be given a fair consideration.

They didn't write the laws. They agreed to them and signed them. They didn't write the treaties. They agreed to them and signed them. They only ask that you keep your work.

MS. HUBER. Thank you. Ms. Murdock, what would be your recommendations for the Federal government or the various branches of the government? What should be done at this time to ensure to the extent possible that legitimate Indian rights and interests are honored?

MS. MURDOCK. I think they should live up to their fiduciary responsibility and trusteeship to the American Indian people.

MS. HUBER. Mr. Pete, do you have anything to add to that, what specifically the Federal Government should be doing, not only in the area of water, but even in broader terms to ensure that the trust responsibility is fulfilled?

MR. PETE. I will echo the same thing that Veronica says. I think that any new statutes that are put on books, such as the Indian Child Welfare Act, the Uranium Tailings Act, which are things that are needed, the kind of laws that we need, but they need to come with money. And we cannot continue to live with new statutes being placed on books with nothing to implement it with.

MS. HUBER. You mentioned a few minutes ago water development that was in effect diverted for recreational use of non-Indians—water which, you say, actually should be the Navajo Nation's water. Is there anything that the Federal Government should be doing to ensure that this sort of conflicting development doesn't occur?

MR. PETE. Well—

MS. HUBER. Before it happens?

MR. PETE. Well, around the Navajo Reservation we have the San Juan River. We have the Navajo Dam; we have the Lake Powell and Morgan Lake. So we see our people standing on top of the—above the water looking down on the lake and see people skiing, people in houseboats fishing. And our people would have to load up domestic drinking water in 30-gallon ammunition containers and haul it 30-40 miles roundtrip just to have water.

I think what we need is funds that we can use to develop lands for agriculture. We need running water in Navajo homes, and the Navajo Nation does not have that type of resources to develop a huge canal system on the Navajo Reservation. We need to have legislation such

as the one that created the Navajo Indian Irrigation Project but with money each year to develop it.

MS. HUBER. Yes, Mr. Black?

MR. BLACK. We are presently exploring the possibility of coming to a better understanding and a relationship with the local county governments; not negotiating anything, but sitting down and exploring ways of problemsolving. We feel that local people should solve local problems. We are now associated with the National Association of Counties in the hopes of maybe bringing a better understanding to the counties and to the Indian tribes in which they reside, so that they would have a better understanding of the Indian tribes' intent. Their intent is no different than the intent of the county commissioners, that of enhancing the community and enhancing the economic development of the community.

We are presently embarked upon that course. I know that if you write a law—recently the United States Department of Agriculture come through with a new law to make food stamps more readily available. After we got it, and the description or the regulations had been written, we were mostly wrote out of it. We found it was almost impossible for us to participate in it. So I don't know that laws will solve all the problems, but I do know that people who are directly affected by these things which are granted to us must sit down and come to a better resolution for the enhancement of their particular communities.

MS. HUBER. Thank you. I have no further questions at this time, Mr. Chairman.

CHAIRMAN FLEMMING. Commissioner Freeman?

COMMISSIONER FREEMAN. Mr. Black, I'd like to pursue briefly the last point that you were making and ask is there now in your community such an area for coalition that you have recommended?

MR. BLACK. I think there is. There is no formal situation there, but I personally had worked with the local county sheriff. I personally worked with the local county commissioners in doing things that the Bureau couldn't get done. Say, for instance, law enforcement to a particular area of time, building roads in a more expeditious manner than would have occurred under normal circumstances.

COMMISSIONER FREEMAN. So then, is it proper then to conclude that there are some good that—there are some things happening of a positive nature at the local level?

MR. BLACK. Yes, I would think so. I think everybody doesn't—they're like Mr. Reid. You don't want to live in a constant turmoil of not knowing who to call in the event somebody enters his home. We've been living under that situation for hundreds of years. See, he's only lived in it for the last 20 years. But we have lived under that situation for the last hundred years. We didn't know who to call either, whoever broke into our homes. And then we developed our police department. May I relate a story here?

COMMISSIONER FREEMAN. Yes.



MR. BLACK. About 38 years ago or 42 years ago, the Cherokee tribe had a court system, and this judge would sentence for serious crimes in the tribe. He would say, "Young man, we have found you guilty of murder and it is my duty to hang on you—" today is March the 19th— "on April the 19th, we have to hang you by your neck until you're dead. Now, we want you to go home and straighten up everything that needs to be straightened up in your home, and on the 19th of April you are to return here when we are going to execute you."

This was a court decision handed down by the Cherokee judge to one of his people.

Then the young man who was sentenced went home for 30 days and did what was right or whatever he needed to do and return for his sentence.

Do you imagine that happening in your court system today? I don't. But I think there are methods and ways in which we can sit down together and do what's best for all of us, not just what's best for you, my friend, but what's best for all of us.

COMMISSIONER FREEMAN. Thank you.

CHAIRMAN FLEMMING. Mr. Horn.

VICE CHAIRMAN HORN. I don't know if any of you were here this morning when we had a discussion on how the Department of Justice might resolve some of these conflict of interest situations that do arise, but I'd like to pursue that, and feel free for any of you to answer.

As you know, legislation was proposed in the early '70s that an Indian Trust Council be established so that there could be an assurance of representation of Indian interests. Some have argued in the Indian community as well as the non-Indian community that that is really not necessary and that there is a danger if that is established, in that the Department of Justice will not be pursuing what some feel is its obligation to defend Indian treaty rights in court situations, and that instead the availability of that device would mean that the representation of Indian interest will always be passed off to the Indian Trust Council.

Some have also been concerned about Attorney General Bell's comments—and I'm taking it out of context a little bit—that—it was in reference to the Maine Indian situation—that there are conflicts of interest and who represents the people of the United States if the Department of Justice represents the Indian interest in that and other cases?

That is not the case I would base a conflict of interest judgment on, but I think you would agree that from time to time there are cases. Sometimes it's the Bureau of Reclamation fighting with the Bureau of Indian Affairs and a tribal government. Other times there's a question within Justice as to how do you resolve a particular issue. I think one point Attorney General Bell raises is a good one, and that is to what degree should administrators in the Department of Justice be judges of these situations prior to the court being judges of the situation.



One possible solution which was brought out in discussion this morning is an administrative process where impact statements are prepared which would show the effect of proposed courses of action or alternative courses of action on Indian communities. Those would be made public. There would be points of access within that administrative review process within Justice where representatives of the Indian community would have an opportunity to voice their opinion, be consulted, etc., prior to the making of a decision.

And presumably, then, Justice would have a better insight and the forces at work could be better seen, be they other bureaucratic agencies outside or inside of Justice, before a final decision is made as to who the Attorney General of the United States represents in court.

I wonder what you think of this latter idea of an open administrative process, chance for Indians to be heard in that process, impact statements, etc., as a way to resolve this so-called conflict of interest situation which is often of concern to many people, both Indians and non-Indians.

MR. BLACK. Well, at the risk of being the one with the mouth, I guess, there needs to be a mechanism whereby Indian tribes can receive litigation on a fair and equitable basis. It cannot be fair and equitable when your judges are appointed by whether they are Democrats or Republicans. We find Democrat judges being appointed to the Federal judiciary benches who have been in Indian litigation as young lawyers either against or for them, and find them sitting on the bench as adjudicating our cases.

We find—I'd like to tell the story of—if I needed help in litigation, the government says go to the Solicitor's Office of the Bureau of Indian Affairs and the Department of Justice. But I'd have to be pretty hard up to ask them to represent me. I want competent legal people who have our concern, not only his heart, but with the ability to present it in a form with no compromise of his future, whether he wants to be President, or Senator, or Congressman at a later date in life.

I agree with you that this possibly could have worked, but then I think also that we should have had some input as to who is going to be on this particular trust council.

VICE CHAIRMAN HORN. Well okay, now, you'll recall that legislation—and I don't have it handy, but when I looked at it in '73, when we visited the Navajo Reservation, there was an opportunity for Indians to be on that group that did make the decisions as to who would be involved in the trust council relationship, and yet we heard testimony from a witness who said this morning that they didn't favor that Indian Trust Council because that would permit the pawning-off of Indian cases from the Department of Justice to another group.

So what you're telling me now is you think in at least some circumstances it might be appropriate to have an Indian Trust Council. And I guess the question is what are the circumstances and to what degree

in other cases should the Department of Justice represent Indians when their rights are under attack in the courts of the United States, or the State courts?

MR. BLACK. It's a difficult question because the Department of Justice has in many cases compromised itself even on civil rights.

VICE CHAIRMAN HORN. That's one you don't really need a vote or evidence before the Commission for many to agree on over the years. Any other comments?

MS. MURDOCK. I just wanted to say that I have always been, I've always had the attitude and I guess it's only changed recently, that there was a supreme law of the land, that the Supreme Court took into consideration all of the facts and all of the presentations, and just recently in the court cases in which we were involved, the *Arizona v. California*, and I found a lot of things there that were disturbing to me, the fact that everybody gets together beforehand and kind of volleys the situation around, and if you'll agree with me, I'll agree with you, and if we can get the Indians to go along we're in fine shape.

Well some of the Indians did go along, and unfortunately my tribe was one of them, but that still bothers me. And I think that when these kind of things are brought forward—and I guess that was a point where you talk about negotiation and accepting things and in the best interest of your own tribe, and yet, you know, other people have different opinions.

But I found that, in those cases, that they are apparently reviewed and a decision is made, and if everybody can get together beforehand, that's okay, regardless of what the evidence may be, regardless of whether there are true facts, whether their affidavits can be supported, and I know that some of the tribes tried to bring that to the attention of the court and it was not listened to.

So when you talk about the Justice Department and Indians being represented, I think it's very difficult to get justice in this country with the whole system for Indian people. I know that some have to win and some have to lose, and that's the way the ball bounces sometimes, and maybe that's a reality that we have to face as Indian people, too.

But I think when facts are not looked upon and judgments are made because of the political atmosphere—you know, I have heard that so many times. I've heard that from the Justice Department—"the political atmosphere is not right. You shouldn't do this; you can't do that."

You know, I think that that's a shame, that's a damn shame, that this kind of situation exists in this country. So as far as what happens down on the lower levels, you could maybe do everything in the world and have the greatest case, but when even the Supreme Court is questionable, when you talk about the political atmosphere, you know how one guy goes and how if we—you know, it's just politics involved in everything.

It really makes one wonder. And as I've said, you know, I was naive enough to believe that that was where truth and justice and the whole bit went, but I guess that flew out the window with Superman.

So I just have to bring that up because I see that as a real problem. The Indians wonder how far up the line they can go. And maybe that's where—and I would really like to know, you know, where you reach a point of justice in this country for Indian people.

I wonder how it affects other people, and I've asked, you know, for us as the National Congress of American Indians to take a look at that and try to assess exactly where we are and analyze how that whole thing operated. I'd like to know.

VICE CHAIRMAN HORN. Well, may I say, I have the same feeling as you do everytime I lose an arbitration case on a decision I've made. Mr. Pete, do you have any feelings on that? As to whether the Indian Trust Council is a viable option to represent the Indian interest in the Federal court system in particular as opposed to leaving it to a decision of the Department of Justice as to what side they'll end up on between competing bureaucratic interests?

MR. PETE. I wonder if there is ever going to be a time when a commission or a council could be created that would be—that would not lean one way or the other. I think that as far as the Navajo Nation is concerned, I think that that could be explored. I think it could be tried and see if it would work, anything to bring about justice for the Indian causes.

CHAIRMAN FLEMMING. Commissioner Saltzman?

COMMISSIONER SALTZMAN. No.

CHAIRMAN FLEMMING. Commissioner Ruiz?

COMMISSIONER RUIZ. Well, I was going to tell Ms. Murdock not to be so downhearted. We're getting a record here. This is the first time in the history of this Nation that we've had this type of a hearing. This is a very historical occasion. This is the first time it has occurred since Columbus landed, as you indicated, or one witness, in 1492, which was 487 years ago.

Now we're making a record here. I think the record is being made very well. Indians pay taxes. Water is being brought to the Indians for irrigation. Problemsolving should be a special procedure. All of this record is being made here. I know that you have a good cause for feeling rather disappointed, but please know that all of us here are in an historical occasion today, 1979.

CHAIRMAN FLEMMING. We are very appreciative of your sharing with us very frankly your views as to the issues that confront the country in this area at the present time. Thank you very, very much.

Counsel will call the next witnesses.

MR. SCHWARTZ. The next witnesses are Sue Gould, Joseph De La Cruz, Charlotte Williams, and substituting for Mr. John Horsley is Charles Patterson.

[Susan Gould, Joseph De La Cruz, Charlotte Williams, and Charles Patterson were sworn.]



TESTIMONY OF SUSAN GOULD, NATIONAL COUNCIL OF STATE LEGISLATURES; JOSEPH DE LA CRUZ, PRESIDENT, QUINAULT INDIAN NATION; CHARLOTTE WILLIAMS, NATIONAL ASSOCIATION OF COUNTIES AND SERVICES; AND CHARLES PATTERSON, SUPERVISOR, NAVAJO COUNTY, ARIZONA.

MR. SCHWARTZ. Would each of you, starting with Senator Gould, state your name, address, occupation, and organizational affiliation, please?

MS. GOULD. I'm Sue Gould. I'm a State Senator from Washington, 21st District. My address is 19225 92d West, Seattle, Washington. And I'm here representing the National Council of State Legislatures.

MR. SCHWARTZ. Thank you. Mr. De La Cruz?

MR. DE LA CRUZ. My name is Joe De La Cruz; that's capital D-e, capital L-a, capital Cruz. I'm the president of the Quinault Indian Nation, State of Washington. My address is Post Office Box 1056, Taholah, Washington, T-A-H-O-L-A-H, ZIP code 987—98587.

MR. SCHWARTZ. Thank you. Ms. Williams?

MS. WILLIAMS. Charlotte Williams, Genesee County, Flint, Michigan; County Commissioner, representing the National Association of Counties and Services.

MR. SCHWARTZ. Mr. Patterson?

MR. PATTERSON. Charles Patterson, Navajo County, Arizona. Residence is Box 414, Shonto, Arizona. I'm a supervisor from that district.

MR. SCHWARTZ. And you also serve in a capacity with the National Association of Counties?

MR. PATTERSON. I am vice chairman of Indian affairs.

MR. SCHWARTZ. Thank you. Senator Gould, there is an Indian affairs task force of the National Council of State Legislatures now in existence. I would like you to briefly tell the Commissioners why this task force was formed and what its purposes are, please?

MS. GOULD. Gladly. I don't know if you have much background on the National Conference, but I'd like to precede it with just a couple brief statements about the National Conference.

MR. SCHWARTZ. Go ahead.

MS. GOULD. It was organized in 1975 as a nonpartisan organization of State legislatures. It has a 43-member executive committee, and the objectives were to improve the quality and effectiveness of State legislatures throughout the country to give them a stronger, more cohesive voice at the Federal level, and also to give them—to foster some communication between the State and cooperation between the State legislatures.

The State-Federal Assembly, which is part of the National Conference of State Legislatures, has eight committees, and they are made up of two members from each State on each committee, so there are 800 members of that assembly.

Aside from the standing committees, we also have task forces. Three years ago Martin Savro, who is now a Congressman from Minnesota, was at the time president of the National Conference of State Legislatures, thought that it was a good idea for States to look into the problems that were developing between tribes and State governments.

I think it was a result of some of the actions in Minnesota that brought that about. So the task force was established for 2 years. It was then reestablished this last year for another 2 years.

It was made up of—it's called the Task Force on Indian Affairs. It's made up of 20 members from 17 different States. There's quite a balance of membership as far as saying how they approach the situation. We have some very strong, hard-headed people in it, and we have some people who are more, very sympathetic.

In fact, we had at one time two Indian State legislators. Hollis Roberts, who is principal chief of the Choctaws, and Leo Watchmen from New Mexico were both Indians and State legislators, and they served on the committee. Leo Watchmen is no longer—

But we started 2 years ago, as I said, with—divided up into three subcommittees more as a way of trying to find where our direction would be and what we should tackle than anything else. One was on jurisdictional problems. One was on Indian education, and a third on water rights. They developed policy statements which were adopted finally by the Federal assembly, Federal-State Assembly, and have been the statement—that has been the policy of that since. Do you want me to go into what the statements were, or—

MR. SCHWARTZ. We can in a minute. I'd like you to first explain what was the purpose, what was the need being addressed by the creation of a separate Indian Affairs Task Force within the National Conference of State Legislatures?

MS. GOULD. Obviously more and more problems or issues were being solved in the courts between tribes and States, and also local governments. And States were not sure—many States didn't believe this was the way—most States don't believe this is the way the issue should be solved; quite often this happens this way.

So we were presented at many State levels issues that we had not had to try to solve before, and it was felt that some broad perspective ought to be made, ought to be studied on what the issues were throughout the country and how resolutions could be brought about.

MR. SCHWARTZ. And you said that some policy statements had been adopted by this task force. Could you describe those, please?

MS. GOULD. Yes, there were three. First, the Indian education subcommittee had—the first was one which said that Indians had an inadequate education provided for Indian students for too long in many parts of the country.

They did oppose H.R. 9810, partly because there is not a good method for parent grievance redress, partly because there were assumptions the State had done nothing, and partly because the money



went into basic education without including enough for a very vital program in special education, vocational training, and job placement of Indian students. That, of course, is no longer an appropriate policy since the law was passed, but it was developed at that time.

In water rights, there were three or four points. The first was it's felt by States generally and within the policy that water rights should be quantified, that you cannot make decisions and final agreements until they are quantified. Then it was also felt that mediation was necessary where agreements could not be reached on the local level; and, finally, adjudication at this—at the State court level.

The original—interestingly, the original policy called for adjudication at the Federal court level. The policy went back—was referred to a committee on natural resources of the NCSL, and finally determination was that policy should be at the State level. It was also part of the policy that there be full compensation for those who have legal rights to the water previously who were being challenged and which was being altered, their legal rights were being altered.

And the last point which was very vital is that the tribe should be represented on any water planning policy bodies at the national, regional, and State level or intrastate level.

The final and probably the most important, in my mind, subcommittee policies was in the area of jurisdiction, and I served on that subcommittee, and now I'm vice chairman of the task force. And I think at this point that the task force will be geared completely to jurisdiction because that seems to be the area that comes just about everything.

But it was our feeling, as it is written in the policy, that we would like to avoid litigation. That litigation and/or comprehensive Federal legislation would be best in the interest of both States and tribes to be avoided. And so we tried to find a way to seek cooperative agreements between tribes and States on an interstate basis. And after a series of meetings that developed last—it was a year ago last December in Albuquerque; Sam Deloria of the Indian Law Center had been with us throughout several of our meetings and consulted with us and has been a very big help to us, frankly.

And at that time I think it was really Sam's idea that a commission be established of Indians, tribal leaders, and legislators which would try to develop a program for local agreements to be made between States and tribes. I have just about three sentences that describe it, and I'd like to read that to you because I think it's the best way of telling you what the purpose is. This is an Indian affairs project. It's out of the *National Conference of State Legislatures*, one of our pamphlets.

NCSL has joined with the National Congress of American Indians and the National Tribal Chairmen's Association to establish a commission of seven legislators and seven tribal officials in a 2-year project. The commission will inventory existing agreements and examples of successful cooperation between States and tribal



governments, identify statutory and constitutional barriers, do additional accords, and draft sample agreements.

The commission will conduct regional meetings to clarify the possibility for future agreements and to benefit from previous experience between States and tribes in negotiating and implementing agreements.

During the second year the commission will have helped specified, State-launched pilot projects involving one or more tribes in that State.

The commission was established. It is funded currently by the Donner and Ford Foundations. Joe is cochairman along with Commissioner Ed Manning of Rhode Island, and I'm sure Joe can tell you a lot more about it. That came out of the policy statement by the jurisdiction subcommittee.

MR. SCHWARTZ. Is that commission now very separate and apart from the task force itself? Do they go about their separate ways?

MS. GOULD. Yes. It's completely separate. It's separately financed. However, the legislators who are on the commission are appointed by the NCSL just as the Indian tribal leaders are appointed by the two Indian organizations. And I think all of us are people who have been—served on the task force.

MR. SCHWARTZ. Thank you. Do you have copies of the policies that you briefly described that you could submit for the record at this point?

MS. GOULD. Yes, I certainly do.

MR. SCHWARTZ. Mr. Chairman, I'd like those to be submitted at this point.

CHAIRMAN FLEMMING. Without objection, it will be done.

MS. GOULD. There are some agreements that have been made that I think are very important now that we have started on the commission, we've been getting reports on agreements. And I'd like to take the positive report on these issues. We can lament all the problems all we want, but it doesn't solve them too much.

So I'd like to point out that we have been able to find many, many agreements that were made in many States on everything from taxation to fishing and hunting rights, to one even in Washington State, just recently, on water rights. And I have to bring that up because sometimes we in Washington are accused—probably at bitter ends of the poles. I think Joe and I can tell you differently, in some cases anyway. Isn't that true?

One was just developed in Washington State with the Yakima Indian Nation on water rights, which I think will have tremendous impact, not only on our State, but also the Indian nation, but also can be used across the country.

MR. SCHWARTZ. I'd like to get back to that point you've raised about some of the agreements that you have found so far, progress report, if you will. But I'd also like to get on to the National Association of Counties, and ask Ms. Williams the structure that had been established in that organization to deal with Indian/non-Indian affairs.

MS. WILLIAMS. NACO's involvement in Indian issues began about 2 years ago when a resolution was brought in the Western Region District, the National Association of Counties, which is now called the Western Interstate Region.

The resolution was approved, recommending that Congress enact laws to clarify the Indian tribal councils so that they would only have legal or political jurisdiction over members of their own tribe and no jurisdiction over nonmembers living or visiting on the reservation. I do have attached here, and I'll see to it that you get, a packet of everything I'm talking about. In March '77, a 2-year study by the American Indian Policy Review Commission recommended that tribal government should have authority to exercise jurisdiction over non-Indian people and property within the reservation boundaries.

As a result of these events, an Indian affairs task force was created as part of the public land steering committee of the National Association of Counties to review and comment on the draft commission report.

The chair was Fred Johnson from Glacier County, Montana. And it represented 30 States, and they were asked to designate members for the task force. Comments to the AIPRC report was developed in early April and submitted to the commission. In February '78, former NACO President William Beech created an Indian affairs committee.

This committee was created in a manner similar to the other committees, the National Association of Counties. They do not have independent policy-setting powers—the steering committees don't.

MR. SCHWARTZ. Would you explain the difference between the other committees of National Association of Counties and the Indian affairs committee as far as how they fit within the structure of the organization?

MS. WILLIAMS. In the task force which is part of the public alliance steering committee, which is a standing steering committee of the task force, was asked to comment on affairs of the Indian tribal nations, and then, the other committees have the right to suggest policy or recommend policy changes to the national body. The resolution comes through the steering committee, through the board of directors who sit at the resolution committee, and modifies amendments and what have you; and then it's forwarded to the entire membership for their vote, either up or down or amendments thereto.

MR. SCHWARTZ. That is, the Indian affairs committee produced the initial draft of the policy recommendation for the association?

MS. WILLIAMS. Did you say how can they do that?

MR. SCHWARTZ. No, I asked did they—is that the process which they—

MS. WILLIAMS. Yes, they did, right.

MR. SCHWARTZ. And then did the association adopt that particular recommendation?

MS. WILLIAMS. No, it did not. The association adopted the minority view of the Indian affairs committee. And that is the policy of the national—of the American county platform policy of the National Association of Counties. The majority view which came from the committee was not the one that was adopted by the body.

MR. SCHWARTZ. So the standing policy now is the minority view?

MS. WILLIAMS. Yes, it is.

MR. SCHWARTZ. Do you have copies of both the majority and minority view, depending on how you look at it, but at least both copies from both the Indian affairs committee and the association to submit for the record?

MS. WILLIAMS. Yes, I do.

MR. SCHWARTZ. Mr. Chairman, I'd like those submitted at this point in the record.

CHAIRMAN FLEMMING. Without objection, that will be done.

COMMISSIONER RUIZ. Mr. Chairman, reference was made to some agreements by the senator, she has available—and I thought it would be most interesting to—

CHAIRMAN FLEMMING. She has already agreed to submit it.

COMMISSIONER RUIZ. Yes, but I didn't hear a—

CHAIRMAN FLEMMING. Yes, they're going to be a part of the record.

COMMISSIONER RUIZ. Very well.

MS. GOULD. Excuse me. I think I was asked to submit the policy. But I'll be glad to submit the summaries of the agreements too.

MR. SCHWARTZ. That would be fine.

CHAIRMAN FLEMMING. Fine, fine. Thank you.

MR. SCHWARTZ. Mr. Patterson, as vice chairman of the Indian affairs committee, can you tell me the steps that the Indian affairs committee has taken to implement Indian policy of the association?

MR. PATTERSON. The organization has only been in effect for 2 years. And it began in Montana in a meeting of the supervisors of the 22 Western States. We met to review these American Indian Policy Review Commissions.

And, at that time, we thought it was slanted. And we formed an organization which Fred Johnson of Montana was chairman of the organization at that time, and took this to Palm Springs to our National Association of Counties Western interstate region meeting. We recommended to William Beech, who was president of the organization at that time, that an Indian affairs committee be formed.

MR. SCHWARTZ. What I'm after at this point is the steps that you have taken since the policy has been established to implement the policy for the association.

MR. PATTERSON. The implementation of the policy was formed by the organization of commissioners from 22 Western States. And—



MR. SCHWARTZ. Perhaps you can describe the policy first that was adopted by the association. What does it say?

MR. PATTERSON. You want me to read the whole policy?

MR. SCHWARTZ. Not the entire policy. There are several questions I believe that appear at the end of it. There is a short statement of the policy in the—

MR. PATTERSON. "National Association of Counties recognize the unique citizenship status of the American Indian. NACO recognizes the important contribution the Native American people and cultures have made to our national heritage, courts and principles of tribal self-government, courts measure to preserve the cultural and social identity of Native American people, cooperate with Indian tribe, constituent services within our individual jurisdictions."

MR. SCHWARTZ. I have a copy of the policy here. One part of it under "tribal jurisdiction" says that "NACO called upon Congress to enact comprehensive legislation which makes clear the governmental powers granted tribes by Congress and/or treaty, balancing the unique status of the tribes with other constitutional concerns."

Have you discussed this part of the policy with Federal representatives, members of Federal agencies or departments or the Congress that might have some authority to do this?

MR. PATTERSON. Nothing other than individual legislators.

MR. SCHWARTZ. Individual legislators; also governmental representatives, as I understand from Mr. Horsley, with whom I spoke, who is the chairman of the Indian affairs committee.

MR. PATTERSON. That's true.

MR. SCHWARTZ. For example, he stated that in May of 1978, the committee was addressed by both State and Federal representatives. He was going to testify about that today. But I understand you were not at that meeting; you do have a copy of the minutes of that particular meeting with you?

MR. PATTERSON. We can make them available, Mr. Chairman.

MR. SCHWARTZ. Can we submit those for the record please?

CHAIRMAN FLEMMING. Without objection, they are admitted.

MR. SCHWARTZ. The policy that was not adopted by the association, but which was proposed by the Indian affairs committee in May of 1978 on tribal jurisdiction, says that "NACO calls upon congress—" this was not adopted—

NACO calls upon Congress to enact comprehensive legislation which makes it clear that governmental powers granted by Congress are limited to government members and their internal affairs. With regard to relations of tribes with nonmembers, constitutional principles of government by consent of the governed, equal protection under law, no taxation without representation, and trial by one's peers should be reflected in the policy adopted.

What were the particular concerns that led to the adoption of that language by the Indian affairs committee alone? Could you describe those please?

MR. PATTERSON. I think you're speaking of the majority report?

MR. SCHWARTZ. I'm speaking of the majority report of the Indian affairs committee, which was not adopted as policy by the national association.

MR. PATTERSON. Many of these views came from many of the supervisors or commissioners at that meeting. I would surmise that commissioner had recommended that portion of it.

MR. SCHWARTZ. Can you explain to the Commission, since you've been with the committee since it was founded, what some of the concerns are that were expressed by the members of the committee that led to the adoption of this language?

MR. PATTERSON. Many of the members felt that certain jurisdictional issues would not be met without the legislature's approval or be submitted to the legislature. Those areas that we could not address or confront at the local level, we'd have to go on Federal legislation.

MR. SCHWARTZ. What issues, in your view, are those that you cannot confront at the local level?

MR. PATTERSON. I would say probably the water rights issues, the game management issues, the health and education issues, the natural resource issues, the major issues of jurisdiction and jurisdiction in general. There are minority areas where the Indian reservations and the counties can get together and solve their own problems.

MR. SCHWARTZ. Can you describe some examples of where the counties and the tribes have gotten together to solve some of those problems at the local level?

MR. PATTERSON. I think in the elections areas that the local government and the Indian tribes can get together as far as resolving some of the problems around election laws—

MR. SCHWARTZ. What problems are those around election laws?

MR. PATTERSON. Basically, the interpretation of their language into the ballot. We have interpreters in the county that come off the Navajo Reservation to interpret the ballots.

MR. SCHWARTZ. Go ahead. And some of the other areas?

MR. PATTERSON. Some of the other areas, I think in some small areas—in the game and fishing areas where the local resolvment of the problems that exist.

MR. SCHWARTZ. Are you aware of any such agreement?

MR. PATTERSON. In some States there is, where State, counties, and tribes have gotten together to resolve their issues. In Arizona, it hasn't been a fact.

MR. SCHWARTZ. Have there been any similar agreements to what you're discussing in your own county, Navajo County in Arizona? Are there problems that can be agreed upon, do you think, at the local level?

MR. PATTERSON. I think basically if you get the people down to talk about it, if they can—it's very difficult to get the non-Indian sector and the Indian sector together to discuss it. And many problems could be resolved if they could sit down and discuss them. But many times, it's difficult to even get them to sit down and talk with each other on these types of problems. I think it could, yes, if they were to sit down and talk about the problem.

MR. SCHWARTZ. Are there some of these problems which really should be developed at the local level rather than at the national level?

MR. PATTERSON. Very definitely, very definitely.

MR. SCHWARTZ. Can you give us an idea of some of those that should remain at the local level?

MR. PATTERSON. I think they all could if the people would get down and talk about them.

MR. SCHWARTZ. Is there a problem that you see with respect to national legislation covering all tribes in all parts of the country for a particular issue?

MR. PATTERSON. Every Indian reservation is different, and it's going to be difficult to establish Federal legislation that's going to control and develop an aspect for all tribes.

MR. SCHWARTZ. Thank you. Mr. De La Cruz, would you first address the issue of the Commission on Tribal-State Relations from the Indian point of view; what it is that you're hoping to gain or to see developed from that committee?

MR. DE LA CRUZ. Well, as the cochairman of that commission, and I approached—

MR. SCHWARTZ. Please speak into the microphone.

MR. DE LA CRUZ. I approached all four of these organizations about 3 or 4 years ago: national Governors, national attorney generals, NACO, National Council of State Legislators, offering to sit down and begin some type of talks to see if those areas intergovernmentally that we could work out at the local level.

Of course, that was over 2 years ago. The National Council of State Legislators was the only organization that came back and approached the two national Indian organizations. At that time, they thought it would really prove fruitful to take a look at intergovernmental relations between Indian tribal governments, county governments, and State governments, and the Federal Government.

And, from that, the two national organizations working with the National Council of State Legislators put together a proposal that they submitted to the various foundations. So we've got a national commission that was going to be doing the inventory work and different States where you've got Indian population and Indian reservations.

One of the reasons I am for that is that I know that there are intergovernmental agreements in existence in many of the States, both formally and informally. And I thought of getting a record of those. The areas where we're having trouble coexisting, we could use examples



from other States where these people have worked these things out; they are coexisting. That was one of the main standpoints where we pursued going into some type of coalition with State organizations.

I don't believe all the tribes are really behind this. They still mistrust State governments very much. But I think that there's going to be some fruitful results as far as the research that is being done. Unfortunately, the history of Indian tribal-State relations went back two, three generations, has all been there because the States have refused to recognize that the treaties preempt State law. And you've got a history of vacillations that have gone on.

Most recently in our State, with the couple of court decisions that were rendered, the *Oliphant* decision that was mentioned, for the first time now the attorney general of the State is saying: yes, we can negotiate and work out some agreements. But before we had that decision, tribes had been going to the counties and States for many years trying to work out agreements. But they couldn't do it until the State got the upper hand.

And I don't think that tribes should sit down and negotiate with counties or States, unless it could be understood that they are equal governments negotiating with one another.

MR. SCHWARTZ. Is that the basis on which you've entered into this commission?

MR. DE LA CRUZ. That's right.

MR. SCHWARTZ. Has there been any effort to involve the National Association of Counties in this commission?

MR. DE LA CRUZ. Their Indian commission was approached again, around the spring of '75 at a meeting in Spokane, to go into some studies on what is possible and what are county governments doing as far as their relationships with tribal government and Indian tribes. And, I guess in the last year, they've got some type of compact going to the National Tribal Chairmen's Association.

MR. SCHWARTZ. Ms. Williams, could you elaborate on that compact with the National Tribal Chairmen's Association?

MS. WILLIAMS. There has been a grant that was pursued to address the services there—

MR. SCHWARTZ. I'm sorry. I can't hear you.

MS. WILLIAMS. I'm sorry. There has been grant secured that would allow the NACO, in cooperation with the National Tribal Chairmen's Association, to work together on intergovernmental problems. That has been pursued and it's in the process now of getting it to work, to do just that.

MR. SCHWARTZ. And what exactly would this grant be doing?

MS. WILLIAMS. It would be trying to work out the local problems that could be worked out between counties and the tribal chairmen's organization, or between different tribes to work out problems that they have between them.

MR. SCHWARTZ. Then, would you see the national association becoming involved at that point?

MS. WILLIAMS. Yes, I would. Of course, my tenure is almost over, but I would certainly encourage the next president to make sure that the organization, I'm sure, with the staff persons, encourage that this would happen.

MR. SCHWARTZ. Mr. De La Cruz, I'd like to turn back to you for a moment and go back in time. When this project began, there was a significant concern about what was then termed "Indian backlash legislation" in the Congress.

We held a hearing in 1977 in Seattle, at which you testified, which partially included some testimony about that legislation pending and the movement behind it. I'd like your views, since we're now about 18 months later, on how that situation, if at all, has changed.

MR. DE LA CRUZ. Well, I don't believe the situation has changed at all for the last 18 months from the time you had the hearing in Seattle. The only thing I can see is that people have gotten a little better organized since you were there. And some of the people have testified here this morning that were on some of your panels in Seattle, screaming at the Indians for taking all their rights, are a little more sophisticated.

I see things happening by State government—the Governor's office, the Attorney General's office in the State of Washington, using that fisheries case as an example, working with the United States Government to work out a settlement plan that is something that is sitting before the Supreme Court right now that they haven't rendered a decision.

And, again, they talked negotiations—Indian people are being accused of refusing to sit down to negotiating tables, have been unwilling to give any grounds. And we're not called in to sit down at the table when it really gets down to talking about areas that concern rights.

The same old thing continues on where we're given someone's draft or something, saying, "You've got so many days to comment on it. If you don't that doesn't matter; we're going to go ahead and recommend legislation to settle this thing."

MR. SCHWARTZ. Earlier in testimony, Mr. Reid testified on behalf of the Interstate Congress. Were you present at the time that he was testifying?

MR. DE LA CRUZ. Yes, I was.

MR. SCHWARTZ. Rather than any particular question, I'd like to open it up for you to respond to the matters that he brought up in testimony from the viewpoint of Indians and Indian-non-Indian conflict situations. Would you care to address anything that he had to say?

MR. DE LA CRUZ. Well, he kind of drifted around. Unless you ask me a specific question of what he was trying to get at, I—

MR. SCHWARTZ. Well, one of the matters that he raised and much testimony was taken on that I had mind was the matter of treaty rights versus those of homesteaders, prior rights in time and problems of control of governments over an area; that is, the homesteaders feeling that

they didn't have a say in the voice of the government that would govern the reservations that they were homesteading on.

MR. DE LA CRUZ. I would be glad to attempt to answer that, because as I said earlier, that the treaties, and even the Executive orders that established Indian reservations, preempted State law. And as you review what happened in the development of the West, there were various acts that Congress passed to allow settlers to settle on Indian country, one of which was the 1910 Homestead Act.

In looking at the history and what happened in those days in the *Congressional Record*, there were attempts to dwindle the size of the reserved land that the Indians had at that point in time. If you look at the line of questioning that were asked of the different tribes and tribal leaders at that time, they were given one of the two choices.

I'll give you a good example of what happened on the Washington coast, the Quinault Reservation. When the General Allotment Act was enacted and became law, the United States Government, through the Bureau of Indian Affairs at that time, asked the Quinault leaders: we're going to allot all fishing for Indians on your reservation from Northern California to Neah Bay or from the Columbia River to Neah Bay—which would you choose?

You don't have much choice. So then all the tribes ended up on the coast of Washington. If you look into the history of the way a lot of those allotments were made and the reason that people were able to move into those lands—in our case, it was timber. In other tribes' cases, it was farming land. And there was a lot of manipulation. And I think you're going to find that some of these lands were allotted through treaties. Sure these people were concerned, because there were many past wrongs in dwindling 155 million acres of reserved Indian lands down to 55 million acres today.

And really, one of the best solutions would be to somehow, between the United States Government and State governments, appropriate the money and pay the fair market value back to those people and establish those reservations that were reserved by treaty.

MR. SCHWARTZ. Do you see that as an appropriate role for the Federal Government to play?

MR. DE LA CRUZ. Definitely, and State government. I think when you look at some of the past vacillations and how the lands were—actually the Indians were hoodwinked of those lands, and the records will show that.

MR. SCHWARTZ. Thank you. Mr. Chairman, I have no further questions at this time.

CHAIRMAN FLEMMING. Commissioner Ruiz?

COMMISSIONER RUIZ. I have no questions.

CHAIRMAN FLEMMING. Commissioner Saltzman?

COMMISSIONER SALTZMAN. Are you recommending that in relationship to those that are under the Homestead Act, living on areas of the reservation who have a legal beef in the light of—



MR. DE LA CRUZ. Yes. I think that in most cases, with the proper surveys and proper—what do you call these people that go in and evaluate property? A lot of these people, if they are given a fair market value for what they've built and would be willing to move on rather than this conflict continue—not all of them, but the majority of the people would.

And the States displace other people by condemning land or going in and offer the fair market value when they've got projects going ahead. And when you look at my State, for example, there is approximately 4 million acres of Indian land. And there's a lot of checkerboard in those reservations. When you look at the vast size of the State, what was reserved for those Indians, 4 million acres is not much land.

And you even find less; in some States, you find more. And we've got this checkerboarding situation that has created problems for going on four generations. And the manipulations that have happened from the 1890s up to the present day on actually taking that land, I think the less painful solution would be to buy that land back and establish back to what those treaty reservations were.

COMMISSIONER SALTZMAN. And you're suggesting that total self-government?

MR. DE LA CRUZ. That's right.

VICE CHAIRMAN HORN. Are you recommending that you would buy it back at current fair market value?

MR. DE LA CRUZ. That's probably what would have to be the case because of the way things are in the United States today. I'm sure that the timber companies have gotten 80-acre timber allotments all for \$5,000, from some drunken Indian—wouldn't take \$5,000 for half-million dollars for our timber today. That's an example of things that are in courts right now.

CHAIRMAN FLEMMING. Mr. Nunez?

MR. NUNEZ. No questions.

CHAIRMAN FLEMMING. I've been very much interested in the testimony from the members of the panel because it indicates that dialogue is taking place with the State legislature and the tribes and the county governments. And I think this commission that has come into existence is a very encouraging sign.

This is certainly an area where there are a great many unresolved issues at the Federal level. There is no doubt about that on the basis of the testimony that has been presented, and we know that further testimony will underline some of those issues.

It's clear that there are a lot of the State and county, local level—but I've been encouraged by the fact that there is some dialogue underway. I was encouraged by that fact in the hearing in Seattle.

There was a clear indication there of dialogue taking place between some of the county governments and the tribes—not all of them, but, I mean, we had some examples of situations where there wasn't any dialogue also.

But we did have some testimony which was very encouraging from that point of view. And I certainly want to commend those of you who are investing your time and energy in this type of activity, because in the long run, I'm confident it will pay some dividends. Thank you all very, very much for being with us; we appreciate it. Counsel will call the next witness.

MR. ALEXANDER. Forrest Gerard.

[Forrest Gerard was sworn.]

**TESTIMONY OF FORREST GERARD, ASSISTANT SECRETARY OF THE  
INTERIOR FOR INDIAN AFFAIRS**

MR. ALEXANDER. Mr. Gerard, would you identify yourself and the position you occupy for the record? And it would be helpful if each of the persons accompanying you would identify themselves.

MR. GERARD. Yes, Mr. Alexander. I am Forrest Gerard. I currently serve as Assistant Secretary of the Interior for Indian Affairs.

MS. HVALSOE. I'm Sue Hvalsoe. And I'm a Special Assistant to the Assistant Secretary for Indian Affairs.

MR. FREDERICKS. I'm Tom Fredericks, the Associate Solicitor for Indian Affairs. And I will be on the program tomorrow. I'm just accompanying the Secretary here today.

MS. HARJO. Susan Harjo, Special Assistant to the Assistant Secretary for Indian Affairs.

MR. ALEXANDER. Thank you. The Assistant Secretary position for Indian Affairs is a new one with this administration. Is that correct?

MR. GERARD. That is correct.

MR. ALEXANDER. Could you explain to us what purpose was to be served by creating this new position, what problems were being addressed, or what potential was being sought to be achieved by creating this new structure in the Department of the Interior?

MR. GERARD. Early on in the administration, Secretary Andrus concluded, and I believe rightfully so, that it would be helpful if the head of Indian affairs within the Department was elevated to an Assistant Secretary's level.

You are aware, of course, that in the past the head of that activity in the Department has always been the Commissioner of Indian Affairs. I think it's fair to say that over the years that the Commissioner served somewhat at a disadvantage in representing Indian interests, particularly in the conflict areas, because most of his competitors, so to speak, are those hitting at the conflict areas. In my view, this placed him at a disadvantage in dealing with the decision that the Department name a secretary, the undersecretary, and the solicitor. So that it was always difficult to remove the Indian viewpoint of a given conflict into that maze.

I think by elevating the position, as I have stated, to the Assistant Secretary, for the first time in the field, at least we were given an



equal footing within the Department in terms of dealing with other functional interests that often are at odds with Indian affairs.

MR. ALEXANDER. In terms of the enhanced stature of the Indian affairs within the Department by the creation of the position, does it have implications for the dealings with other departments of the government in terms of coordination of policy outside the Department of Interior?

MR. GERARD. I think it's fair to say that there is an increased potential for improved intergovernmental relations with other departments and agencies, as a practical matter, given the range of issues, both the trust issues and some of the public administration problems we've been addressing in the past year. We have not moved out too aggressively in that area. But I do recognize that this—

MR. ALEXANDER. Well, for example, if the Department of Agriculture had a problem that had some issues relative to Indian affairs, would it, as a matter of standard course within this administration, have to check through your office, or would it be appropriate either way?

MR. GERARD. Well, there is a fair amount of informal checking back and forth, both at my level and—I think it's fair to say—particularly down at the program level in the Bureau of Indian Affairs, in the whole area of social services. I know there is a great deal of contact back and forth with professionals in the Department of Health, Education, and Welfare and so on. I've had a fair amount of contact with some of the other Assistant Secretaries on given issues.

MR. ALEXANDER. As a functional matter, that happens. But structurally, at this point in time, there is no particular requirement that other departments coordinate their role with respect to Indian affairs through your office. Would that be accurate?

MR. GERARD. Not that I'm aware of. If I may pursue that point, I'd like to suggest to the Commission that I'm really not all that optimistic that that's going to occur readily for the reason that I think you immediately get into areas of jurisdiction, turf problems, which are not foreign to Washington, D.C. I think we've all recognized for years that the coordination of Federal programs and services, as they should be applied against Indian problems, are not the best coordinators in the Federal Government. I think it's not enough to say that the Assistant Secretary for Indian Affairs shall coordinate—

MR. ALEXANDER. For sure.

MR. GERARD. —absent the clear-cut authority and the responsibility. I think the best you can do is some promoting, maybe some major casework. But in terms of an institutionalized approach, I don't see that happening, absent some legislative action.

MR. ALEXANDER. In effect, I would take it today that you are the major spokesperson within the Department of Interior, outside the Secretary, for the trust responsibility, for the administration of the trust. Is that a fair statement?

MR. GERARD. Yes, that's correct.



MR. ALEXANDER. Could you give us your views as to what your responsibilities institutionally would be as an administrator; what is the obligation in your viewpoint?

MR. GERARD. Before answering that, I'd like to talk just generally about the manner in which we approach the issues within the Department. I think you're aware, as maybe some of the Commissioners are, that for a little over a year, or approximately a year, I served in a dual role, both as Assistant Secretary and as the head of the Bureau of Indian Affairs.

The Commissioner's post being a statutory post, in addition with the Secretary, in—administration was merely set aside. I might add that's an experience I wouldn't care to go through again, with the backlog of issues and problems and the kinds of public administration challenges that we were faced with.

As I saw it, given the serious trust problem, conflicts, and backlash that many times go to the confrontation over scarce Indian natural resources, I saw my fundamental role as the Assistant Secretary in terms of advocating the Indian position, either in a conflict situation, to make certain Indian views, the proper legal background, the fact situation was brought before the decisionmakers, and given our day in court, so to speak.

In nonconflict situations, I saw again my responsibility, say, in the program areas, to be a forceful advocate and carrying forward the needs that Indians manifest in many areas, in terms of trying to get a good answer, adequate funding and budget, and so on.

A considerable amount of time was spent in dealing with some very difficult trust issues that have been sort of placed on the back burner. I might point out that Mr. Fredericks joined the administration at about the same time that I arrived in the fall of '77. He and I tried systematically to deal with a number of these very difficult trust issues. For example, the question of the United Tribal Governments had to be met head on in order that that group—this is the group from New York—might not lose out on the important land claim that is now pending.

We were faced with the question immediately of the Crow tribal government, which spoke for the tribe in terms of negotiating leases. At the same time, there was some very important work going on in reforming the implementation of the Alaskan Indian Land Claims Settlement Act.

We spent considerable time with the Secretary to move towards major reform in that area. We had to pick up the Indian portion of the President's national water policy. These are a few examples of specific areas where my office, my staff, have played an instrumental role.

MR. ALEXANDER. The panel that preceded you was focusing on the potential for working out some conflict settings on a county, State, or municipal level with tribal government. Does the Bureau have a role

to play with respect to these types of discussions and negotiations, and has it been playing any role to date?

MR. GERARD. I sort of think not only the Bureau, but the administration, the Department, and specifically my office—I accepted a speaking engagement before NACO at their midwinter conference in Palm Springs last February and delivered a major statement on Federal-Indian relations conflicts, the roles and rights of tribal governments, leading up to the important potential of negotiations as a means of alleviating some of the current conflicts.

Specifically I believe that the Bureau is currently funding, at least sharing funding of some of the joint efforts that are going on now between the tribes and the legislatures. We're looking at a proposal with NACO that will call for some funding on our part with the Office of Personnel Management.

MR. ALEXANDER. Some of the testimony we've received in the field hearings, and I guess earlier today, indicated there is a substantial amount of ignorance or misinformation, to be generous, among the population generally when it comes to Indian rights, tribal status, the whole panoply of issues that affect Indian people. Does the Department or your office specifically, other than the speechmaking function that you've referred to in relation to NACO, have an ongoing program, or does it have an ongoing program to try to combat that situation?

MR. GERARD. First of all, I would concur with your characterization of the lack of understanding and perhaps total rejection in some instances. In the past, the Bureau of Indian Affairs, Office of Public Affairs, has attempted to put out certain kinds of materials on the different issues. At the present time, upon evaluating the whole public affairs function, not only within my office, but within the Bureau, with a view towards improving the kind of approach that you've just suggested. I think there are untold opportunities to improve the level of understanding within the legal—the treaty and other legal rights.

MR. ALEXANDER. In our field hearing last August in Seattle, we took testimony concerning the regional team of the Federal Fisheries Task Force. And at that time, it was indicated by the three members of the regional team, that the plan that they had drafted was "a dead issue," in their words. You, I take it, are a member of the Federal task force; is that correct?

MR. GERARD. That is correct.

MR. ALEXANDER. Could you give us in your view, what is the appropriate Federal role on the task force at this point where the case is before the Supreme Court and where the parties at the local level have not come to any consensus?

MR. GERARD. The national task force was created in early April of '77. As you recall, I joined the administration in the fall of that year. I became a member of the national task force. I think that was appropriate because of the important Indian rights involved.



As far as the role is concerned, it is the official responsible for oversight of Federal trust responsibility on this issue. I see my participating on that task force as a trustee, and equally important, as an advocate for the interest of the Indians and responsibilities, obligations of the trustee.

MR. ALEXANDER. You've just said that your role is as an advocate on that task force. But in terms of how you view the task force process generally, should the Federal task force, in effect, be dormant in this period of time, awaiting the Supreme Court? Should it be proposing a legislative solution? What is an appropriate role for the United States in this turn of events from your perspective?

MR. GERARD. You've mentioned the fact that the proposal, the regional task force, was rejected by virtually all parties, in essence, made it a nonproposal. I guess it was in September of last year, in the State of Washington—proposed a settlement to the Attorney General and to the Secretary of the Interior. Our role, I believe, in that instance was to evaluate that proposal, which was done, and to submit that to the tribes, to their organization, the Northwest Indian Fisheries Commission, for further review and input on their part.

MR. ALEXANDER. In the testimony earlier this morning by Mr. Deloria and Mr. Pelcyger, they suggested that a serious lack in the current system for Indian involvement in Federal policy was that there was not systematic access to decisionmaking. They were basically referring to departments other than yours—in fact, said that there had been substantial improvements of Interior over the last several years. Would you care to comment on that generally in terms of the government, whether you view there to be sufficient input for Indian tribes and organizations into the decisionmaking process?

MR. GERARD. I would to this extent. If I understand that question correctly, I think the problem herein rests in the fact that when you move beyond Interior—where one of our major responsibilities is serving as trustee of Federal-Indian relations—other departments, HEW, HUD, Commerce, and so on, view their mission in life as being national in character, at least in my experience in dealing with the other agencies and departments. I don't believe that it's anything insidious or negative on their part. But it's difficult for them to fit into their national mission some of the unique characteristics and peculiarities of Indian affairs. I think this is where we do get into some difficulty as policy decisions are moved forward in other departments and agencies.

MR. ALEXANDER. Does your office play a role in trying to open up some of those doors?

MR. GERARD. We've tried that. I think we probably work as closely as Justice for obvious reasons more than any other agency.

MR. ALEXANDER. I'd like to get your views on what kind of changes, if there are changes, that you would see in the way Federal policy in relation to Indian affairs as organized today, that would perhaps help in the resolution of conflict and support the United States' trust responsibility beyond the system that we have existing today.



MR. GERARD. I might ask you to—

MR. ALEXANDER. You want me to rephrase that?

MR. GERARD. I want to make certain I understand your question.

MR. ALEXANDER. As you well know, there are a number of situations existing today where tribes are in conflict with non-Indian communities, with potentially other portions of the Federal Government. There are situations that we could all project over the next decade where types of conflict settings could arise again and may well.

What I was asking was whether there were things that could be being done within the Federal Government, either through executive action or legislation, that would help or try to cure some of those problems before they got to explosive stages or set up mechanisms to try to resolve those conflicts, resolve them without violating the trust responsibility.

MR. GERARD. I believe the kinds of steps that we're involved in now, and I give much of the credit to the tribal leadership in this regard, in terms of trying to work out some understanding at the local level with the national legislatures organization, the National Association of Counties.

My expectation is that if the administration pursues the whole idea and the concept of negotiations in lieu of litigation, that we're going to have to come a little more refined in our approaches, as we encourage the tribes and other interests to come together around the table. We've had the experience in a couple of situations on water negotiations. We did some work for the Northwest Indian Fisheries Commission, tribes, trying to keep negotiations alive in the Northwest.

But it seems to me that negotiations are going to be a viable approach, that we need to think in terms of more specifics from our end, perhaps provide resources to the tribes so they can hire expert professional and technical people to back up their positions—perhaps underwriting costs of professional negotiators and mediators, whatever the situation may be.

These are the kinds of ideas that I would have in mind, to really give some life and vitality to the whole negotiating concept; now, beyond that, it seems to me that we fail in negotiations—not every situation, I don't think, will lend itself to that.

Then I believe that the United States Government must stand on its trustee role, and if litigation is the answer, then we would pursue that vigorously as the trustee representing tribes and charged with protecting the Indian legal interests.

MR. ALEXANDER. Mr. Chairman, I don't have any further questions at this point.

CHAIRMAN FLEMMING. Commissioner Horn?

VICE CHAIRMAN HORN. I'm going to wait until the end.

CHAIRMAN FLEMMING. Commissioner Ruiz?

COMMISSIONER RUIZ. Mr. Gerard, where does the Department of Interior draw the line of what is good for Indian tribes as opposed to

the burgeoning needs of an urban, non-Indian population? How many masters are being served in the so-called trust relationship?

Is there a conflict of interest between the Indian rights to natural resources, such as water and others, and the Department of Interior's exercise of jurisdiction over these natural resources? The question I would suggest a dissertation on is that you, in the vastness of your experience, point out for the record the gray areas which exist in government involving this trust relationship. We are very much interested in that.

MR. GERARD. I'd like to take a moment to confer with counsel.

Mr. Ruiz, we view the trust responsibility as involving doctrine, a dynamic function of the United States Government. Certainly there are conflicts. We are well aware of them in the Department of the Interior when those occur. The key decisionmaker, that being the Secretary of the Interior, must be the ultimate person to resolve those internal conflicts. If it's an interdepartmental kind of conflict in the trust area, then you would, I believe, view the Department of Justice as the location where those decisions should be made.

You made note of the burgeoning urban Indian population. Federal policy today does not extend to the extent of providing all of the special Federal benefits of the reservation—

MR. RUIZ. No, I said burgeoning non-Indian population.

MR. GERARD. I'm sorry, I misunderstood you.

MR. RUIZ. The conflict between the Indians and the burgeoning non-Indian population with relation to these resources that are under the jurisdiction of the Department of Interior. This is where I want the gray area straightened out.

Now, you have mentioned—certainly we know that there are conflicts. And don't assume that we know. We don't; we want to know where those conflicts are. You mentioned the Department of Justice, wherein lies the conflict? This is the reason I asked for a dissertation out of the experiences that you've had, because it's going to be very helpful to us. I understand that it is an evolving situation. But if you can give us points of references, then we can develop this evolvement a little bit more.

MR. GERARD. Let me try this approach. I believe the United States is faced with the responsibility of serving the general public interest and yet, at the same time, carries this unique trust responsibility on behalf of Indians where this may come in, in terms of the use of water, for example. The competing interests that the Indians may have versus, as you pointed out, a burgeoning non-Indian population in the West, this may require a variety of approaches, negotiations, litigation, and so on.

Another example might be in terms of the energy situation today. The crisis is upon us. Many tribes possess valuable energy-related minerals: coal, oil, gas, uranium, and others. They may or may not wish to develop those resources.



MR. RUIZ. Would you suggest a special prosecutor of some kind, would you suggest some person or department or a separate department of advocacy with relation of these matters?

MR. GERARD. No, sir. I would advocate and would support a retention of the current system, if I understand your question. Again, several years ago, legislation was proposed to the Congress that would have established a special trust council to serve Indian interests, particularly in the conflict area. Some of the arguments against that approach was that it becomes the victim of Congress; it could dry up its funds immediately, thus rendering it ineffective against the large interests that would still have the Department of Justice and the Department of the Interior.

MR. RUIZ. Have there been other alternative suggestions, other than trust council, made?

MR. GERARD. Well, there have been special forums set up to deal with some issues, for example, the Indian Claims Commission. It was established in 1946 to deal with the series of claims that had not been settled against the United States Government. Suggestions have been made for a special forum to settle some of the current conflicting claims that exist in water jurisdiction and other areas.

MR. RUIZ. Now, you started to mention the Department of Justice, its role, when I interrupted you before.

MR. GERARD. The Department of Justice is the attorney for the United States. And I would favor, and getting back to my point, a retention of the current system, that when litigation is required, that the United States—the Indian's interests would be represented by the United States through the Department rather than any other special counsel arrangements of some sort.

MR. RUIZ. Are you comfortable in the position of Assistant Secretary in view of these conflicts that are developing from a sense of a professional person? It's a difficult question to answer. But do you feel that this development is proceeding positively and favorably?

MR. GERARD. I believe that we are making headway. In answer to your question, there are some issues and areas, naturally, where I am uncomfortable in terms of—I'd like to illustrate again; when we discover some of the conflict situations, the United States has underwritten cost of legal fees when it cannot represent a tribe because of conflicts within the Department or perhaps intertribal conflicts. So other techniques are being utilized.

MR. RUIZ. How about the techniques when you come across this because you would be the first with your sensitivity to realize the conflict of utilizing private counsel, directly representing, let us say, one of the constituents, a public service law firm, something that would be tied into the constituents.

MR. GERARD. That is occurring in many instances already.

MR. RUIZ. That is occurring?

MR. GERARD. Yes, sir.

MR. RUIZ. Can you give an instance where it has occurred?



MR. GERARD. There is one public interest law firm that has been involved in a number of Indian cases. I refer to the Native American Rights Fund, operating out of Colorado.

MR. RUIZ. Had that been referred to from the Department of Interior, or is that just an independent thing? I'm thinking of where you have made a reference, the Department of Interior has made a reference to private counsel.

MR. GERARD. In the *San Juan* case where it was definitely determined that the Department was faced with a conflict of interest, private legal counsel was supported by the United States Government in this instance. I don't believe the government selected the attorney; the tribe exercised that choice.

MR. RUIZ. Just one last question. And while we're on this and for purposes of the record, I notice you're referring to counsel because he knows, or perhaps he's more involved in these matters, could you make a list of four or five or six of those instances, so that it could be inserted at this time as part of the record.

MR. GERARD. Sure.

COMMISSIONER RUIZ. Thank you very much.

CHAIRMAN FLEMMING. Commissioner Saltzman?

COMMISSIONER SALTZMAN. In line with the direction that Commissioner Ruiz was leading toward, who decides when it is appropriate for the special counsel other than the Department of Justice to represent Indian interests? Who decides that this is indeed a conflict of interest in this particular case?

MR. GERARD. We generally pursue this matter with the Solicitor of the Department.

COMMISSIONER SALTZMAN. Does the tribe itself have an input in determining that they think there is a conflict of interest at this point and they want to be represented by other counsel, other than the Department of Justice?

MR. GERARD. Mr. Saltzman, in many instances the tribe and its leadership are the first to bring this to the attention of the United States Government.

COMMISSIONER SALTZMAN. They on their own make that determination?

MR. GERARD. No, that generally must rest with the Department.

MR. SALTZMAN. Isn't that itself a point of conflict of interest, Department of Justice as the sole determinant of when the conflict of interest exists?

MR. GERARD. That determination is also made within the Department of Interior. It is at that point where we have authorized the payment of private attorney fees.

COMMISSIONER SALTZMAN. You pointed to the interest of the United States to serve the general public. Let's take the area of energy and minerals that are available on Indian land. The Secretary of Interior, and appropriately it seems to me, would determine that he has to serve

the general public and perhaps not see an area of conflict, whereas a tribe might see an area of conflict.

And the Secretary of Interior may not at that point desire to suggest to the Department of Justice a special counsel ought to be hired. But I'm looking ahead: is there a way of reducing some of the areas? The sense of powerlessness and abuse that we've heard today on tribal leaders and individual representatives of the Indian community—where the statement was made to the effect that even if it's only one white person, it's viewed in opposition to the interest of the Indian community. That's viewed as the public interest, and the Indian rights are generally abused.

MR. GERARD. I believe that the President, the Secretary, and myself have spoken rather strongly in terms of how we perceive our trust responsibility. There is no immediate solution to the so-called conflict area.

My point is, one example, the very difficult decision that was made last year, when rules and regulations were promulgated to govern fishing on the Klamath River in the State of California, counsel informed us that the tribes' reserved right extended to the right to fish commercially. We supported through Indian Affairs the Indian's right to fish that stream commercially in the face of extreme opposition from the State's sports interest. This is one area where a decision was made in face of the broader interests involved here.

This is not to say that we win on every issue. I don't know of any quick solutions to minimize the efforts other than the kinds of patient groundwork that I believe is being established by the Indians themselves, in some of their reaching out and trying to coexist with the non-Indian community. A trustee standing on his legal responsibility—sometimes the threat of litigation is enough to keep people around the table to resolve the issue.

COMMISSIONER SALTZMAN. Thank you.

CHAIRMAN FLEMMING. I'm very much impressed with your concept of your position. It's clear to you that you are a trustee, functioning as a trustee, and functioning as an advocate within the Department of Interior on behalf of the American Indian community.

Do you have any difficulty in determining at what point you need to function as an advocate when it comes to your relationships with the Department of Justice?

MR. GERARD. Mr. Chairman, there are often situations where one does experience difficulties in terms of my legal trustee role versus wanting to play an advocate in improving Indian interests to the Department of Justice. Generally the line is that I must work through the Solicitor's Office. I take my case to my Associate Solicitor. We try to develop our legal arguments and facts and persuade the chief legal officer of the Department, namely the Solicitor, to carry our viewpoint or argument forward to the Department of Justice.

I do not enjoy a formal working relationship back and forth. There are many informal contacts. But generally I work—

CHAIRMAN FLEMMING. Entirely through the Solicitor?

MR. GERARD. Through the legal office.

CHAIRMAN FLEMMING. Right, okay. Commissioner Horn?

VICE CHAIRMAN HORN. I'd like to pursue the problems of coordination. Your position is rather interesting. In one analogy I can think in the Federal Government that has existed for almost a decade is that of Assistant Secretary of HEW for Education in relation to the Commissioner of Education.

You have held both the position of Commissioner of Indian Affairs and now Assistant Secretary of Indian Affairs simultaneously. So in a sense, you have an unusual insight into the power and resources that go with the commissionership that might not go with the assistant secretaryship.

One of the problems that's obvious to anyone who has studied HEW is that the Assistant Secretary of Education has very little power. The Commissioner of Education has most of the power, most of the resources, most of the people, and there's really no good reason why the Commissioner of Education has to really listen to the Assistant Secretary of Education, unless the Secretary almost everyday says, "Do so," because the congressional relationship, the history, everything else is with the Commissioner.

How do you feel about this relationship in Interior? Do you see the Assistant Secretary's role as really being able to direct Indian policy? Or does the Commissioner really have the resources and the history and the heritage in the tradition and some of the delegation when the chips are down?

MR. GERARD. We have attempted to do that, Mr. Horn, in separating out to clarify the role of the Assistant Secretary in terms of policy formulation, chief trustee advocate for Indian Affairs, planning and evaluation, monitoring, and so on.

With the day-to-day management of that Bureau being under the direction of the Commissioner who has currently been recruited, I'm somewhat familiar with the circumstances you point out in HEW.

It's my belief the manner in which we are currently structuring the Assistant Secretary's role in Interior, to be the chief officer overseeing Indian affairs in general, is that we are avoiding some of those short cuts. It is my hope that the proposed Office of Planning and Evaluation—that would be an immediate staff office to my office, plus the management oversight office as being created, will give the Assistant Secretary in this instance a couple of tools to work with that perhaps they do not possess over in HEW.

VICE CHAIRMAN HORN. And you would be coordinating the efforts across the board in the Federal Government that have to an impact on Indian matters, I take it?

MR. GERARD. Yes, we view that as a major responsibility.

VICE CHAIRMAN HORN. To what degree does HEW have programs that impact on Indian education?



MR. GERARD. I think just about the full range of U.S. Office of Education in one way or the other impacts upon the Indians. There are some specific areas where Indians have been identified in legislation. I believe Title IV, the Indian Education Act, has provided additional resources, both for classroom, research, model testing, parental control, and so on. Scholarship areas, Headstart—all of the social services throughout HEW—all impact the Indian community.

VICE CHAIRMAN HORN. One of the President's original proposals in his recommendations to Congress to create a Department of Education was that Indian education be included in the new Department of Education. Given the fragmentation that exists now among all these programs, between your Bureau, between HEW, between the States, between the tribal governments—wouldn't it be a good idea to get Indian education in HEW, just as the Indian Health Service has moved to HEW?

MR. GERARD. When that question came before us last year, Indian Affairs generally recommended against the inclusion of the transfer of education function to the Department, not so much on the grounds that the Bureau had done an outstanding job over the years, but, in our view, the question really was education.

The message that I began to receive from the Indian community, and I would tend to agree with this position, was that a transfer of education out of the Bureau represents a fragmentation of the agency that is charged with fulfilling a substantial portion of the trust responsibility on their behalf. As it turned out, the legislation was not enacted that called for the transfer. And I believe this year, the mark-up thus far eliminated Indians altogether, such a transfer to—

VICE CHAIRMAN HORN. That's correct. One could say, and when this Commission held hearings on the Navajo Reservation in October of '73, I think it was certainly our feeling that the transfer during the Eisenhower administration of the Indian Health Service to HEW definitely meant a substantial upgrading of the quality of health care on Indian reservations.

MR. GERARD. I don't think we can deny the fact that that particular transfer has resulted in new-found resources to deal with the Indian health question. However, if one really unfolds the legislative history and looks at the era in which that transfer took place, it's my view, my conviction, that Congress' motivation was not so much predicated on improving the health status of American Indians, as much as it was pursuing the termination policy and dismantling a substantial portion out of the Bureau of Indian Affairs. I think the record, if you really analyze it, will substantiate that point.

VICE CHAIRMAN HORN. Getting back to coordination a moment, in terms of other matters of coordination between your Bureau within Interior, there's a program where sites that might have Indian villages historically located upon them, burial sites, other things, can be registered within Interior. Is that within the Indian Affairs domain, or is that separate within Interior?

MR. GERARD. That's under the heritage conservation area.

VICE CHAIRMAN HORN. I just wondered the degree to which they coordinate those efforts with your—

MR. GERARD. The Assistant Secretary for Parks, Fish, and Wildlife, we enjoy a very amicable working relationship with him in dealing with such matters as this. Also, if I might point out, the administration is currently in the process of implementing the American Religious Freedom Act.

VICE CHAIRMAN HORN. That was my next question, so go ahead.

MR. GERARD. Which was enacted in the last Congress. Our Department does have the lead in implementing that legislation, and specifically Ms. Harjo on my immediate staff has spearheaded the effort within my immediate office.

VICE CHAIRMAN HORN. Well, that's what I was concerned about is the degree to which, in terms of environmental concerns and possibly clashes in relation to lands which Indian people might feel are sacred, was being resolved in conflicts within the Department of the Interior. And I wonder what kind of a process was being established—

MR. GERARD. We are currently appealing a development, I believe it's in the San Francisco area, northern Arizona, in which some of the tribal groups view that as a sacred ground. We have formally referred this to the Secretary for any further action on that until we can see if there are some alternative arrangements to be worked out.

VICE CHAIRMAN HORN. Did you want to add anything? Go ahead.

MR. GERARD. We might point out to the Commission that the task force implementing the Religious Freedom Act will meet again on April 2, and we would extend a cordial invitation to any of the members or staff who might care to sit in on those deliberations.

VICE CHAIRMAN HORN. Thank you. Let me move to a few last questions that concern education. When this Commission held a series of hearings in New Mexico and Arizona and on the Navajo reservation in the early seventies, our hope had been at that time to culminate them with a national hearing in Washington that did deal with some of these areas.

As you can see, the focus on this hearing is on a much narrower base than education, health, and employment, with which we dealt earlier in the seventies. But let me just pursue a few general questions. If you want to respond for the record later, feel free to do so.

One of the obvious things this Commission found when it went to the Navajo reservation was the multiplicity of school systems that pertain to trying to educate members of the Navajo tribe, a tribe that occupies an area, as you know, the size of the State of West Virginia.

You had the Arizona school system and the New Mexico school system, the Utah school system, private school systems, some public school systems, some BIA school systems, Navajo tribal systems, etc. And we found a difference in how the Johnson-O'Malley Act was administered in those States. And the flow-through of those funds that



affected children differently in different parts of the reservation. We also found that there was an inability of BIA in Washington at that time to delegate responsibility to review the various sources of funds from other than Interior to the area field offices of BIA.

I just wonder, in general, if you could give the Commissioners a feel for what progress has been made in the last few years to try and coordinate the education programs through BIA so that the Indian child can receive a better supported and more appropriate and effective education than he or she might have received in the early seventies.

MR. GERARD. There was—a revision of the Johnson-O'Malley rules and regs, I believe about 3 or 4 years ago, '75 or '76, in my view brought about a more equitable funding arrangement.

I'd like to defer further comment on Johnson-O'Malley for the reason that we are currently implementing Public Law 95-561, which calls for some further revisions in the Johnson-O'Malley Act and the task force dealing with that particular area, which is not yet completed.

So we will hopefully move towards an equitable formula for the allocation of the Johnson-O'Malley fund nationwide. Also, the Congress enacted the Indian Self-Determination and Education Assistance Act in 1975 that authorized parental control of Johnson-O'Malley similar to the provisions in Title IV, Indian Education Act, administered in OE.

VICE CHAIRMAN HORN. Are you happy with the educational programs that have evolved? Or do you feel BIA should take a leadership role in doing some other things, not simply with Johnson-O'Malley, but whether it's within HEW or not, making recommendations so that we would have less duplication, multiplicity, fragmentation of education on some of these Indian reservations?

MR. GERARD. Well, certainly I, along with a number of other public officials, am not satisfied with the performance of the Indian education efforts today, including federally-operated schools. I think the problem is that once the—you want to speak to the public school sector, it seems to me that once the Federal dollar leaves the State department and flows through that process, there is very little monitoring or evaluation over the use of those dollars.

I think the Bureau's role, as we improve our own education efforts, can be more advisory to the Office of Education, hopefully our experience in working with the tribes, supporting the concept of self-determination, their ability to assume control and manage the Federal school systems currently existing.

VICE CHAIRMAN HORN. Do you see a possibility of ever delegating most of the authority to a tribal school structure as such?

MR. GERARD. The authority is already there through Public Law 93-638.

VICE CHAIRMAN HORN. So we aren't running competing school systems anymore then?



MR. GERARD. Well, at least in terms of the Federal school system, the right of the tribe to assume control and management of those Federal school systems exists through Public Law 93-638.

VICE CHAIRMAN HORN. That's in the advisory, sort of community council sense?

MR. GERARD. No, sir.

VICE CHAIRMAN HORN. To actually administer it?

MR. GERARD. To assume the control and management fully, including the funding.

VICE CHAIRMAN HORN. One of the other things that has long interested me is that in the early seventies, the attitude of some in the Bureau of Indian Affairs seems to be that when we provide college scholarships for Indian students, they were more at the community college level, they were more oriented toward vocational needs. And I wondered if there had been any change in the area of encouraging Indian students to pursue professional fields in law, medicine, these areas, and how you felt about that?

MR. GERARD. Yes, there are. We are doing that in a variety of ways. We underwrite a substantial portion through the Bureau, through the American Indian Law Program. It's administered at the University of New Mexico. There are other special scholarship funds to support Indians in the area of medicine and some of the other shortage-category areas. I think we're currently supporting approximately 2,000 students in higher education.

VICE CHAIRMAN HORN. Are you aware that there is a different criteria that BIA uses in definitions of what progress is and how long a student has to be in college to continue on aid, and what the Office of Education uses, and to what degree—is there any reconciliation being made?

Actually, my impression—and I don't have the document in front of me, but I'd like to furnish it for the record and have the comment of BIA—my impression is that BIA regulations work adversely against the student, compared to what the Office of Education regulations do in relation to students funded through the Basic Education Opportunity Grant. I just wondered where that differed?

MR. GERARD. I would further respond for the record.

VICE CHAIRMAN HORN. Sure.

MR. GERARD. I'd like to have an opportunity to review the document in detail.

VICE CHAIRMAN HORN. Thank you. We'll furnish that to you.

CHAIRMAN FLEMMING. We appreciate very much your spending this time. It's been very, very helpful. Thank you for the leadership you're providing. This hearing is now in recess until 9:00 tomorrow morning.

**Tuesday, March 20, 1979**

CHAIRMAN FLEMMING. I will ask the hearing to be in order. Counsel will call the next witnesses.

MS. HUBER. Would Mr. Dale Wing and Mr. Eugene Suarez please step forward to the table. And will you gentlemen stand to be sworn?

[Dale Wing and Eugene Suarez, Sr., were sworn.]

**TESTIMONY OF DALE WING, CHIEF, INDIAN CRIMINAL JUSTICE PROGRAM,  
LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, AND EUGENE SUAREZ,  
CHIEF OF ENFORCEMENT, BUREAU OF INDIAN AFFAIRS**

MS. HUBER. Beginning with Mr. Suarez, would each of you please state your name and the position you hold?

MR. SUAREZ. My name is Eugene Suarez. I'm Chief of Enforcement for the United States of Bureau of Indian Affairs.

MR. WING. I'm Dale Wing. I'm the Chief of the Indian Criminal Justice Program with the Law Enforcement Assistance Administration, Department of Justice.

MS. HUBER. Just to locate each of your position within the structure of the Department of Interior and the Department of Justice, Mr. Suarez, whom do you report to in the Bureau of Indian Affairs?

MR. SUAREZ. I'm under the Office of Indian Service; Mr. Theodore Krensky is the Director, who is under the Assistant Secretary, Mr. Gerard.

MS. HUBER. And Mr. Wing, whom do you report to in LEAA?

MR. WING. I report to Mr. Ken Carpenter, who is the Director of the Special Programs Division. That is a unit in the Office of the Criminal Justice Program, which is one of the offices in LEAA and it clears down to below the Administrator.

MS. HUBER. LEAA is under the line authority of the Deputy Attorney General Mr. Civiletti; is that correct?

MR. WING. That's right.

MS. HUBER. Thank you. Mr. Suarez, would you describe the responsibilities that your position entails in regard to law enforcement on Indian reservations?

MR. SUAREZ. As chief of the division of law enforcement I'm technically, from a staff position, in charge of about 350 Federal Indian officers that are stationed on 145 Indian reservations in 23 States.

In a technical sense I'm also—or at least provide technical assistance to about 900 tribal officers in one form or another, whether it's by directive or whether it's by private contract, or whether it's just by being a helping hand, so to speak, whenever technical assistance is needed by Indian tribes.

In that regard, the annual budget for the Bureau's law enforcement is about \$27 million a year, and tribes spend about \$9 million a year of their own money.

MS. HUBER. And I take it through these various responsibilities that you are in a position to be in communication with law enforcement operations in most parts of Indian country—both tribal and BIA?

MR. SUAREZ. I'm in constant contact almost on a daily basis with almost every Indian community in one form or another.

MS. HUBER. Mr. Suarez, I'd like your comments on a number of areas, beginning with whatever observations you have on the prosecution and investigation of serious felonies committed in Indian country falling under the Major Crimes Act.

MR. SUAREZ. Yes. As you know, Mr. Chairman, the United States Government—that is, the Federal Bureau of Investigation, the United States attorney's office, the Bureau of Indian Affairs—we're responsible primarily for the investigation of the Major Crimes Act, Title 18, 1153; these are the felony offenses. In 1977, I think we in the Bureau of Indian Affairs in conjunction with the FBI investigated about 7,000 major crimes. These were investigated jointly by the FBI and the BIA—in many instances, primarily by the BIA, and other instances by the FBI.

MS. HUBER. Mr. Suarez, when a major crimes offense is committed on the reservation, what is the process by which it will come into the law enforcement system and what ordinarily will happen?

MR. SUAREZ. Generally speaking, when an offense occurs—any serious offense occurs—the local police officer, whether he be tribal or Bureau, probably will answer the first call. At that time, if it is a serious offense or one of the ones that are deemed to be a violation of a Federal law, the Bureau of Indian Affairs investigator that's stationed on the reservation will probably be called. He will pursue the investigation and somewhere down the road he will call the FBI.

Now, up to this point, at least within the last year, this had sort of been a melding of functions, and there had been no real clear delineation of who did what. Within the last year a number of United States attorneys throughout the United States have issued guidelines so that each agency will be responsible for investigating a number of particular offenses.



And the United States attorney for Arizona is here and other jurisdictions are here, so they can address themselves particularly with the guidelines they issue.

But we with the Bureau will investigate it, and in many instances would turn the report over to the FBI, who would also do some additional work on it. And then eventually the report would go to the United States attorney who would make the final determination as to whether they would proceed to prosecute for a violation of a Federal law.

Within the last year, this has been somewhat streamlined in a number of jurisdictions so that if an offense is deemed to be one of those offenses that's left up to the tribal police—alcohol, if it's not a manufacturing, although it is a violation of Federal law—they would investigate it and make necessary arrests and make the necessary prosecutorial determination.

If it were some of the other major offenses, the Bureau of Indian Affairs would investigate them and make direct referral to the United States attorney. Some of the more serious offenses, the FBI would make the investigation and would make the referral to the United States attorney. Ultimately the United States attorney has the responsibility for determining whether a case that comes to his attention is going to be prosecuted or not.

MS. HUBER. Mr. Suarez, do you see any difficulties in the system by which these major felony offenses tend to be handled?

MR. SUAREZ. Well, there are a number of difficulties. Although they are being handled with great dispatch at this point, the difficulty arises in terms of how the community sees the wheels of justice move. If you have a serious offense that occurs on a reservation and it takes time for the FBI to get the report; it takes time for the United States attorney to make a determination. The tribal police or the Bureau police, for that matter, can make an arrest only for a misdemeanor. And this is the way that we hold a man.

Well, the Civil Rights Act of 1968 says that you can only hold a person for a limited time; you can only fine him a certain amount of money. If the case is under consideration by the United States attorney, it may be a week, it may be 2 weeks, it may be 4 days, it may be whatever—

MS. HUBER. And what would ordinarily happen to the offender during this—or the accused during this period?

MR. SUAREZ. Well, if he has not been arrested for a minor offense, he's out in the eyes—he's out on the streets in the community. And this in and of itself has a great effect in the eyes of the community who sees that justice doesn't move at all or it moves very slowly, because the local community does not know what the procedures are; they don't understand that there are some steps to be taken. There are a number of administrative layers to be followed through.

And so they see the assailant walking around; apparently the community feels that nothing is being done. And this in itself has a very negative effect, a totally negative effect as to how people perceive justice on Indian reservations. And it's a recurring problem. It's something that people in the Indian communities, people that—law enforcement officers who have worked on the reservations have to contend with. They take the position that, "Gee whiz, you're not doing anything; nothing is happening; why is that man or that woman out on the street. Gee, they assaulted my family."

Then you have the potential for all sorts of retaliation from one group to another, and this in and of itself causes additional problems.

MS. HUBER. Thank you. Mr. Suarez, were you involved with the 1974 Department of Justice Task Force on Indian Affairs?

MR. SUAREZ. I was, very much so.

MS. HUBER. Could you describe what that task force was and just briefly what your involvement was?

MR. SUAREZ. Well, after Wounded Knee, around the time of Wounded Knee, the Department of Justice and the Department of Interior felt that an overall look was necessary to ascertain the status of justice in Indian country. A number of people were assigned to the Department of Justice in the Office of Policy and Planning at the time of the Deputy Attorney Jonathan Rose, and I was involved along with a number of other people in the Bureau of Indian Affairs.

And a series of meetings, a series of position papers were given to Justice, series of tours and interviews between Indian country by the Department of Justice staff. A report was issued in 1974-75. I forget what it was.

MS. HUBER. Were the issues that you mentioned a few minutes ago addressed back in 1974?

MR. SUAREZ. Yes, they were.

MS. HUBER. Is that the subject of the examination?

MR. SUAREZ. Well, the sum of it; not all of it. In addition to the problem in terms of declinations by the office of the United States attorney, there were a number of issues that were identified that had to do with the organizational structure of the Bureau of Indian Affairs that did not permit a cohesive development of an effective law enforcement program, whether it was tribal or Bureau. So some of the issues, or at least most of the issues, that were addressed in that report have not been implemented as far as I can determine.

MS. HUBER. You mentioned the declination rate by U.S. attorneys; what are your comments on that? What is the situation?

MR. SUAREZ. Well, we do not have what the data looks like for '78, but in the past the declination rate—that is, the number of offenses that had been accepted by the United States attorney for prosecution—was running about 50 percent. Now that's just a ball park figure. It may vary from jurisdiction to jurisdiction.

Whatever the effect is, more offenses, serious offenses are being handled on the local level than handled in the Federal proceedings, which in the eyes of a number of—many of us should be handled in the Federal sector. They are serious offenses. And whether alcohol, which is one of the biggest problems on reservations, is a good basis for prosecution or not, a number of the United States attorneys will not prosecute if alcohol is involved.

Now I know there's a number of problems with that. If a person has been drinking and does not know what happened, there's difficulty in proving intent and all the legal sides of it. The fact remains that the Indian community looks to the Federal Government for the prosecution of serious offenses, and when it's not happening, you have, again, this negative impact in the eyes of the Indian community as to the role of the Federal Government in Indian country. That's where the whole problem starts. The mistrust begins at that level, and when you begin to mistrust the police and the criminal justice system, all the other little sections of the wall begin to crumble.

MS. HUBER. Thank you. Mr. Wing, could you briefly describe your responsibilities in regard to law enforcement on Indian country?

MR. WING. My responsibilities go to developing recommendations for policy to the agency regarding criminal justice programs in the Indian community.

Secondly, I develop an annual program which provides funds for either grants or contracts to Indian tribes that are eligible under our act to improve the criminal justice system on Indian reservations. Because of the stipulation in section 601 of our act, there is a procedure that Indian tribes go through to get certified so that they can participate in LEAA programs. That certification comes through the Secretary of Interior.

At the present time there are about 185 Indian tribes that are so certified. They include also Alaskan Native villages. My responsibility is to develop a program that will provide funds for the Indian community to undertake projects that have impact either on a multitribal basis or a statewide or a multistate or regional basis in improving the criminal justice system.

I would want to comment also that in addition to that responsibility, I am responsible for providing some technical assistance and evaluation for those programs for Indian tribes.

MS. HUBER. Mr. Suarez mentioned that a number of misdemeanor offenses are handled within the tribal courts and also a number of cases are declined by the United States attorneys and referred back to the tribal courts that are, in fact, felony offenses. Do you in your work become involved with the functioning of tribal courts as well as the police on Indian reservations?

MR. WING. Yes, we've become involved in two ways. Number one, the LEAA is funding training programs for Indian judiciary systems. At the present time there are about 265 judges and associate judges and



officers of the court that are participating in a training program that is offered in four locations in the country and six different training sessions.

This represents about 122 tribal courts that are operating and participating in the program. The training itself is geared at three levels—number one, for beginning judges, because we observed that there are about 20 percent turnover of judges within this group. And in addition to that, we have an advanced level of training that goes into tribal law and court procedures. A third option we have available for the tribal judges is to take training in court activities that are offered in training programs in other parts of the country.

They also participate on a limited basis in seminars with State judges, which provides them an opportunity to sit in a State court and follow the proceedings and to have a discussion seminar with the presiding judge to discuss procedures and application of law.

The other area that we are developing and examining at the present time is to set up a clearinghouse that will address the matter of referral of cases that are not being handled by the U.S. Government back to the tribal courts.

It's been observed that in a number of instances where the case is presumably to be taken by the U.S. Government, that if the case is not accepted by or taken by the U.S. Government, there is a lack of follow-through from the tribal point of view, and they don't know where the case has gone. In some cases it would revert back to their jurisdiction, they would have some area of responsibility. We are at the present time exploring that with an organization called the National American Indian Tribal Court Judges Association, who has been taking the lead in this area of training and providing technical assistance.

So if we do get that project off the ground, we would be addressing this one issue that Gene has mentioned about what happens to the case when it's declined.

MS. HUBER. Just backing up a little, from your vantage point, how do you see the tribal courts functioning at this time and what, if any, impediments do you see to their maximum effectiveness?

MR. WING. It's probably in one of maybe three areas. Number one, in the area of tribal governments who are retroceding and assuming jurisdiction, there is a kind of a gray area where they are not able to obtain the kind of assistance in planning and development of a judicial system. We are looking into the possibility of providing some technical assistance to those new tribal governments in the sense of assuming responsibility for criminal justice activities.

The second area we see a chance for problems is in the upgrading, the training, and development of tribal courts and stabilizing the membership so that we can somehow or other influence the high turnover, and we can assist the judiciary members to be on the bench longer periods of time.

The third area is exploring new areas of assuming greater responsibility. There's an Indian Self-Determination Act that was passed a number of years back, which provides the tribal governments the opportunity to contract with the Bureau of Indian Affairs for running their own tribal programs.

One of those programs that the tribes are considering and have accepted responsibilities is for operating their criminal justice system. The extent to which they can become involved in that appears to have a relationship to their ability to administer programs in general.

So we are getting a request for assistance to help them, number one, plan for the assumption of contracting with the Bureau of Indian Affairs to run their tribal courts; secondly, once they have developed that contract, then to assist them with technical assistance and training so they can properly administer that program.

So in summary there are three areas that we're kind of concerned with and dealing with. The principal focus that I use, like I mentioned earlier, is through this tribal judges association.

MS. HUBER. Mr. Wing, approximately how much in terms of dollars is at your disposal for these and other Indian justice programs?

MR. WING. In fiscal year 1979—which is our current year—I have an allocation of \$2 million from the discretionary portion of the LEAA budget that I use to address these programs that I've described.

MS. HUBER. How does that amount compare with what you've had in previous years?

MR. WING. About 3 years ago we started downhill. At that point we had close to \$5 million for the programs. And at that point also we were administering a number of programs to individual tribal governments. But since this current year of 1979, we've had a change in policy which takes us out of the business of providing grants for individual tribes and focuses on the national scope aspect.

And so a year ago we had a budget of in excess of \$3 million cumulatively. We got some money to address Indian programs through the other portion of the LEAA budget called block funds, and that's the portion where the money is passed from LEAA to the States, and in those particular cases we have assisted some tribes to go to the State office and ask for funds.

So, like I mentioned, about 3 years ago we had close to 5 million; a year ago we had about 3. This current year we have 2. I don't know what the forecast for fiscal 1980 is yet.

MS. HUBER. How has the cutback in funding affected your ability to develop programs and provide all the services that you mentioned?

MR. WING. It very seriously curtails the efforts that we have in terms of requests from the Indian tribes and Indian organizations. I have been, since I've been with the LEAA program going on 5 years now, coordinating efforts with Gene Suarez. And in the past we've been able to work cooperatively, and where the Bureau's basic program has had some deficiencies in responding to requests, we've been able to fill in and provide some specialized kind of service.



So anytime that you cut off either the Bureau of Indian Affairs budget or plateau their funding level or you cut back on the amount of money that LEAA provides, it's going to influence and impact the Indian community very negatively.

MS. HUBER. How so? Could you tell us what you mean by a negative impact on the Indian community?

MR. WING. All right. For example, we've initiated within LEAA a number of efforts to assist the tribal governments collectively in moving ahead to develop their capability to administer criminal justice programs. We've done this through training, through technical assistance, through evaluation, and through certain kinds of studies.

One effort that I have that is culminating in a model regional corrections programs started 2 years ago and that is the corrections programs in minimum security facilities that will be in operation by next summer up in the Swiftburg Center on the Cheyenne River Sioux Reservation in South Dakota.

This was brought about because we are able to, the first year, conduct a feasibility to see the desirability and feasibility of having a regional corrections facility that would be run by Indian tribal governments for Indian people. The second year we developed a procedures handbook and met some of the deficiencies in the feasibility study. The third year we went in and provided funds for the rehabilitation of this center and provided some staffing and set up an evaluation.

Now, what happens now is when the money is cut back, then other areas that have to be developed in a longitudinal manner are similarly cut back, and we have to postpone the initiation of those kinds of programs. In the current year I have initiated a discussion to develop some efforts and examine the delivery of services for Indian women in the criminal justice system, both in the employment area and, secondly, in the corrections field, too. Right now if the budget is cut further back next year, I will not be able to go into the second stage for that kind of a development, so that is one example.

Another example is that where we've initiated the development of some rehabilitative models for juveniles in the State of Alaska, where we've done a review of the literature, the development of some demonstration models, and this year we're in the process of trying out the rehabilitative practices that have been developed in these models.

Next year we're going to have to go into the field of finishing up the demonstration and doing the evaluation. In fact, there are going to be some hard decisions to be made as to which program is curtailed and which one is moved along. So because of the continuation process that we have going, anything you cut out of the monies, then you're going to have to cut one or two of the program areas.

MR. SUAREZ. If I may add, because they cut LEAA's money does not necessarily mean that we get an increase in our budget. We have not—

MS. HUBER. You mean in the Bureau of Indian Affairs' budget?



MR. SUAREZ. In the Bureau's budget. We have not been able to accommodate any of the programs, and with the rare exception, we've been able to accommodate any of the programs that have been terminated by LEAA either by—because of the lack funds or because of their funding mechanism.

So it creates a real problem, and although we coordinate as much as we can, there are still limited funds available, and when his program stops, the tribe does not have the money to pick up the program; the Bureau does not. It creates a great big impact and a hole that's left by the services formerly given by that program.

We don't foresee, unless we get a fairly good increase that would limit—at least 3 million in 1980 or '81—we're going to have to drop some of the programs that are currently being funded by LEAA.

MS. HUBER. Mr. Wing mentioned some work LEAA has been doing in the juvenile justice area. Do you perceive any problems in the provision of correctional services to juveniles, Indian juveniles, in distinction to adults?

MR. SUAREZ. Ms. Huber, the Bureau at this point does not have any viable juvenile delinquency programs in operation anywhere that I know of; a number of tribes do, but the Bureau does not have any. And as tragic as it is, in 1978 we arrested something like 7,000 or 8,000 juveniles. And we don't have—there are exceptions, you know. These were individual efforts by individual people, but not as a policy standard or programs. In many instances tribes and the Bureau are forced to lock up children in facilities that are not adequate for the care of these kids. So there is a number of problems that all come back down to the funding problems.

MS. HUBER. Thank you. Mr. Chairman, I have no further questions at this time.

CHAIRMAN FLEMMING. I just like to clear up one or two things. Reference was made to a 1974 task force on which you served. Did that task force issue a report?

MR. SUAREZ. Yes, it did.

CHAIRMAN FLEMMING. Do we have a copy of that report?

MS. HUBER. Yes, we have a copy in our files, Mr. Chairman, that we can insert in the record.

CHAIRMAN FLEMMING. I would appreciate having it inserted in the record at this particular point.

MS. HUBER. For the record, that's Department of Justice Task Force on Indian Affairs, their final report.

CHAIRMAN FLEMMING. I think I understood you to say that the recommendations contained in that particular report have not been implemented; is that correct?

MR. SUAREZ. To the best of my knowledge they have not, sir.

CHAIRMAN FLEMMING. Okay. Mr. Wing, I noticed in connection with your discussion on the financing problem that you said that recently the LEAA, the Department, had indicated that the tribes could apply

to the States for part of the States' allocation of LEAA funds. Have some of the tribes made application directly to the State for support for some of these projects?

MR. WING. Yes, they have and they are doing that.

CHAIRMAN FLEMMING. Have they met with any success?

MR. WING. The figures that I recall that I had a tabulation on—I don't have anything current for the fiscal year '79—in fiscal year '78 the tribes applied for and received consideration for about 1.3 million.

Now, the one area that I want to make a distinction here is that the tribes make application for funds to assist their local criminal justice programs. But the tabulation that we have in our system provides information showing grants that go to communities where Indian people reside. In a number of cases in this tabulation, the program grant went to the county where Indian people resided, and some Indians were also included in that particular services.

So in the total of 1.3 million, that would include programs that went into a community. For example, like Tucson, Arizona, received a bilingual program that affected and provided services for all minorities, Indian included. So there is that kind of distinction, but it is not made in our computer printout.

CHAIRMAN FLEMMING. Thank you. Commissioner Freeman?

COMMISSIONER FREEMAN. Mr. Suarez, I want to pursue statements that you made earlier concerning the lapse of time between the commission of an offense and the apprehension of the individual alleged to have committed that offense. First of all, would you give some—let me ask you if any of the offenses that you were referring to include felonies, or if they are aggravated assault, armed robbery, rape, murder, arson, burglary, those such offenses?

MR. SUAREZ. Yes, Commissioner. The Federal Government has primary jurisdiction for what we call the Major Crimes Act. Those are all felony offenses—murder, rape, assault with the intent to kill—the whole range of them. I think there are 13 or 14, whatever the case may be. Any of those offenses that occur in Indian country are the responsibility of the Federal Government. So they are felony offenses. Now, they may be—an assault is an assault. It may be that somebody gets hit with a baseball bat as opposed to a bottle. It still is a violation of a Federal law.

In a number of jurisdictions—and I can't tell you which ones—they are dealt with differently. There's no real policy, and it's up to each individual United States attorney to look at a particular offense, weigh the merits of that offense, and make a determination whether to prosecute on the evidence or not.

Now, Indian country is unique in that it's not a question of apprehending somebody. In the 18 years or whatever that I've been in the Indian services working in law enforcement, it's not a question of going out looking for somebody that's escaped. More than likely the assailant is always there and you can identify him readily. And more than likely he's going to admit to what he's done.

COMMISSIONER FREEMAN. May I interrupt you right here?

MR. SUAREZ. Sure.

COMMISSIONER FREEMAN. At this point there is no representative of the Federal Government—I want to be sure I understand what you're saying. The offense has been committed. There's no question of finding that person. In the usual jurisdiction outside of the reservation there would be an arrest?

MR. SUAREZ. Generally speaking, yes. What happens is, Commissioner, that after the offense occurs, if there is no minor offense to arrest the person for, the chain is that sometime some United States attorney will prosecute on the basis of a telephone call. If it's a very, very serious offense. Yes, they will.

COMMISSIONER FREEMAN. When you say "a telephone call," you mean a long-distance telephone call?

MR. SUAREZ. Yes, ma'am. See, most of—

COMMISSIONER FREEMAN. There's no representative of the U.S. attorney on location?

MR. SUAREZ. The United States attorney for Montana, say, is at Butte, if I remember correctly. Now, you may have somebody at Billings, but I remember that their offices are at Butte.

It's a question of getting authorization from the United States Attorney whether to prosecute or whether to arrest the man for violation of a Federal law. We have to go to a United States attorney who makes that determination.

COMMISSIONER FREEMAN. Do you have any information, any reports, of the number of such incidents?

MR. SUAREZ. Yes, Commissioner. We can provide it for the record if you so like.

COMMISSIONER FREEMAN. Mr. Chairman, I would like to request that it be provided and inserted in the record at this time.

CHAIRMAN FLEMMING. Without objection, that will be done.

COMMISSIONER FREEMAN. My next concern is what recommendations do you have—and I would also like to ask that of Mr. Wing, also, to the extent that he would have information about this—for change, for improvement? Do we need laws? Do we need an extended jurisdiction? Do we need to remove the jurisdiction or have concurrent jurisdiction of the tribal courts? What is it that is needed?

MR. SUAREZ. Oh, Commissioner, what a wonderful opportunity to provide a shopping list.

COMMISSIONER FREEMAN. Well, provide it. This is what—

MR. SUAREZ. Okay. I cannot speak for the Indian community, but from the Bureau of Indian Affairs law enforcement point of view, I would like just to share some thoughts with you.

From a law enforcement point of view, I would like to see some consideration given to letting—or in the Bureau's organizational structure, structuring it so that the law enforcement people are responsible for the law enforcement program. At the present it is very difficult for



I, as a staff officer, to follow the various levels and the various chains to come out with an order on those matters that pertain to police.

I believe that the police system, that is, the Bureau's police system, could be a little more effective, a little bit more professional if we had a better organizational structure that will allow us to function. Now, a number of recommendations have been made, none of them pursued and none of them implemented at this time. Be that as it may, somewhere along the way that has to be considered.

COMMISSIONER FREEMAN. Whose responsibility would it be to implement them?

MR. SUAREZ. Well, that would be the Assistant Secretary of Interior. And that's purely an administrative decision that's made within the Department of Interior, the Bureau of Indian Affairs.

In terms of the Indian community, I would like to see United States magistrates placed on reservations so that in the event a serious offense occurs that justice can be speeded up if necessary. What happens in many instances is that an offense occurs, a person needs to be arrested, he has to be taken off the reservation for a hearing at the nearest United States magistrate which may be miles away. It means that there is a delay; there is a delay.

I would like to see the elimination of duplication of services between the FBI and the BIA.

COMMISSIONER FREEMAN. Going back to the U.S. magistrate, could this occur now without any change in legislation?

MR. SUAREZ. I don't believe so, and I'll tell you why I personally don't believe so. I believe that with the efforts of everybody concerned there are a great number of Indian judges that can serve as magistrates, that know the Indian community, that know the problems, that are aware and sensitive to the needs of the community. They know the families. They know everybody. They know the environment.

The existing magistrate law mandates that all United States magistrates are attorneys. There are very few Indian judges that are attorneys. I do believe, though, that the United States magistrate system could be a very effective tool in speeding up the administration of justice if they were located on Indian reservations, so that in the event that somebody has to proceed with great haste to bring somebody to task for an offense that has occurred, he could be taken before the nearest magistrate immediately, and then justice could proceed in the eyes of the community.

The problem is that it does not proceed as fast as it should and as fast as it would in D.C. or in Tucson, Arizona, or anyplace else. You have the problem, Commissioner, of time and distance, and that's a problem.

COMMISSIONER FREEMAN. Mr. Wing, do you have any comments?

MR. WING. Yes. I would agree with the general recommendations that Mr. Suarez made. I'd also like to share with you one effort that we're undertaking that might provide an option or a means to accomplish this getting the magistrate services closer to the reservation.

In western Washington there are a number of small tribes that cannot justify—be justified in maintaining a full-time judge. They made a suggestion, and we are considering their proposal now in LEAA, to have a circuit-riding person who would have a regular schedule to hit the various reservations that are participating.

Now, it occurred to me that perhaps some similar kind of a mechanism with specified dates where the nearest magistrate to be on a reservation would be a step in the right direction to bringing the—or lessening the gap between a period of time when a magistrate or the person to be brought before the magistrate. But it is one of the concerns that the judicial officers and judges have made, expressed to me, as to how this could be overcome.

One other option that has been discussed in the long-range plan of the tribal judges is the possibility of extending their authority to cover additional crimes that then they could try within their tribal court system at the present time. I think that should be explored also.

COMMISSIONER FREEMAN. You mean expand the jurisdiction of the tribal courts?

MR. WING. Yes, ma'am.

COMMISSIONER FREEMAN. Bring the U.S. magistrates on location as circuit riders where appropriate?

MR. WING. [Nodding head.]

MR. SUAREZ. Commissioner, a number of United States attorneys have expanded their jurisdiction in a very de facto way, if you please. They have through their guidelines informed the tribes that they would be responsible for the investigation and prosecution of a number of offenses which are really Federal in nature, but they could be reduced to be minor offenses.

I think that Mr. Hawkins, who has successfully implemented some of these guidelines, can address himself to that. But we have, or at least they have, the United States attorneys have already, in effect, expanded their jurisdiction by just not making these Federal violations at the onset and asserting jurisdiction immediately and making the necessary arrest and prosecution on the tribal level.

COMMISSIONER FREEMAN. But you still have in certain areas a very serious problem of inadequate enforcement of the law?

MR. SUAREZ. Yes, I would say that. If not inadequate, slow. And that's a big problem in the Indian community, as I view it.

COMMISSIONER FREEMAN. Well, we've said in many other areas, "Justice delayed is justice denied."

MR. SUAREZ. Right.

COMMISSIONER FREEMAN. Thank you, Mr. Chairman.

CHAIRMAN FLEMMING. Commissioner Saltzman.

COMMISSIONER SALTZMAN. Mr. Wing, do you have any input from Indian representatives?

MR. WING. From the Indian tribes? Yes.

COMMISSIONER SALTZMAN. Yes.

MR. WING. We hold periodic meetings, and I meet with national tribal organizations and I converse with the leadership of the National Tribal Association leadership periodically. In a number of cases we have grants that we have awarded to national tribal organizations, so that puts me in contact with the boards and with their project directors.

COMMISSIONER SALTZMAN. Did you once have an Indian advisory committee?

MR. WING. Yes, we did.

COMMISSIONER SALTZMAN. Was that helpful?

MR. WING. Very helpful.

COMMISSIONER SALTZMAN. Does it exist today?

MR. WING. It does not exist today.

COMMISSIONER SALTZMAN. Would it be another helpful instrumentality were it reconstituted?

MR. WING. In my opinion, up to the time it was dissolved it provided a forum which we have not had in the past, and there were some very meaningful discussions and input. As a matter of fact, a number of the recommendations are still within the policy areas that I'm attempting to implement.

COMMISSIONER SALTZMAN. How successful, sir, is the departmental communication in the Justice Department with respect to Indian affairs? Is it good? Does it need improvement? Do you know what's going on; do they know what's going on with your department?

MR. WING. It's sporadic and probably responds to where the greatest pressure originates. At the time of Wounded Knee I was part of the task force. Following that I have not been privileged to meet with any departmental unit concerning Indian programs.

But in terms of internal communication, we have a system set up where I report periodically to my Administrator, who in turn sends a report to the Attorney General, I presume. And when they have information they want to receive from LEAA, the request is made to me and I respond to that. But in terms of personal contact or working with a departmental or interagency task force or a group that meets periodically, that is not in operation at this point.

COMMISSIONER SALTZMAN. Would that be helpful in dealing with some of the resolution of conflicts that arise?

MR. WING. In my opinion it would be very helpful, because a number of the problem areas that are identified that the Indian tribes wish to address also impact other units of the Department of Justice, and I think that would be an opportunity for Indians to have a forum. I think that would be the best benefit, would be to provide a forum for those units of the Justice Department which are directly involved, either from Lands Division, Civil Rights, or LEAA. I think something minimal as a quarterly meeting would be worth exploring and perhaps initiating so that we could have this forum where we would have Indian representatives at the meetings to discuss those issues that are pressing with them.



COMMISSIONER SALTZMAN. Mr. Suarez, you, I think, have focused on an area of conflict, the delay of justice, etc., very well. I wonder whether you want or could pinpoint other areas that lead to conflict between the Indian people and the Federal establishment serving the Indian people?

MR. SUAREZ. Mr. Commissioner, I would presume that in addition to the problem of delay of justice is that the Federal Government, the Bureau, LEAA, all of us become involved in a number of ways with the Indian community, offering a lot, giving something, and then withholding. We're talking about LEAA funding, Bureau funding.

We go out and we set up programs that the tribes demand, need, identify as their priority; then all of a sudden the money is pulled out from within. The people that were trained at great expense to the tribe, to the Federal Government, have to be let go. And this among other issues is what tends to lessen the perception of the Indian communities as to how they view the Federal Government, how responsible we are.

At the present we mandated through the Office of Management and Budget in 1976, the Bureau became involved in a very large comprehensive grant planning program. We're in the final process in this planning program for criminal justice services. We've identified primarily that to bring the law enforcement programs as identified by the tribes to the level that they see their needs—not the Bureau sees their needs—about \$14 million. Well, unless something happens, I'm quite sure that we're not going to be able to give, provide, \$14 million extra to Indian tribes in 1981.

Now, what we've done, in effect, is hold out a carrot to the tribe and say, "Hey, plan with us because if you do plan you're going to get some positive results from this." In the event that the tribes, the Bureau, the administration, or whomever makes some additional money available, it's not going to be able to satisfy the two areas that we've already told the tribe, "Hey, if you plan, if you identify your needs, bring about community solutions as you see them, you can get thus and thus."

I doubt very seriously if we're going to be able to satisfy the needs of the tribes as they've identified them in '81. It is a problem. You've got these promises that are always there, these projections that are always there, whether it's in terms of the future or whether it's in terms of how things are happening today.

COMMISSIONER SALTZMAN. What is the source of the inconsistencies of policy that you're identifying here? Is it the Department of Justice, the administration beyond the department?

MR. SUAREZ. Well, I would believe that if I were to point a finger I'd point at the Congress—the Presidential budget. It's Congress who appropriates the funds, and all the other Departments that come between the top and the Indian community who always lives with the problem of less police, less than adequate courts, less than adequately trained policemen, less than adequate anything.

COMMISSIONER SALTZMAN. One final question, sir. You identified a duplication of effort by the BIA and the FBI. What kind of conflict arises there relative to the interest of the Indian community and what the BIA and FBI are doing?

MR. SUAREZ. Well, Mr. Commissioner, in terms of how the—again, speaking from my point of view—I would believe, or at least from my observation for a great number of years, the Indian community probably has a little more faith in the BIA as opposed to the FBI, considering that most of the Federal officers, investigators that work with the Bureau live in the community; they are part of the community. They know the problems; they are involved with it on a day-to-day basis.

Generally speaking, FBI agents are stationed in an urban area, whether it's Great Falls, Montana, or Butte, Montana, or Flagstaff, Arizona; with rare exception are any FBI agents stationed on the reservation. This is not to say that they are not acquainted with the community, but they are not living with the problems on a day-to-day basis. So there is a communications gap; there is a distance gap. And in many instances there is just a great philosophical gap, if you please, as to how they view crime on an Indian reservation, as to how the community views it, and as to how the Bureau views it.

Again, this is not to say that we do not receive the best of cooperation from the FBI. I personally believe, and I think that a number of other Indian—a number of Indian leaders would say that if we could eliminate the duplication, that is, either give it to the tribe, the BIA, or the FBI, one or the other, so that you don't go through layers and justice might be speeded up a little bit more.

A number of jurisdictions through the efforts of the United States attorneys are doing that. I'd say, "tribe, you investigate these offenses; Bureau, you investigate these offenses; FBI, you investigate these offenses." So this way there is a lessening of duplication, but it still exists.

CHAIRMAN FLEMMING. Commissioner Ruiz.

COMMISSIONER RUIZ. As I've listened I've been reliving history. The problems that you've mentioned are really, in a general sense of the term, not new; we have an historical background in the Southwest of distance and time gaps, and during our horse and buggy days we had traveling judges and nonattorney judges presiding over great distances. Now, as I understand it, we have a three-court system; is that correct? Indian tribal courts, Federal courts, and State courts? Is this what we're dealing with?

MR. SUAREZ. Mr. Commissioner, at present we have a two-court system.

COMMISSIONER RUIZ. Two-court system?

MR. SUAREZ. Yes, sir. Just tribal courts and/or Federal courts.

COMMISSIONER RUIZ. No State courts?

MR. SUAREZ. No, sir.

COMMISSIONER RUIZ. Now, has a manual been published available to each court, two courts, so that at the time of arraignment a tribal or a Federal court could certify a referral immediately?

MR. SUAREZ. I do not know. Other than the work, Mr. Commissioner, that's been performed by the American Indian Judges Association, I do not know of any other manuals as such. Now, the United States attorneys here may have issued instructions or issue instructions to all of us in one form or another on the latest rulings, whatever they may be. But in terms of an operational manual, none that I know, sir, except the *American Indian Judges Manual*.

COMMISSIONER RUIZ. Now, that *American Indian Judges Manual* and the funding that takes place, with relation to the training program, I assume that the judges, Indian judges, are able to identify the difference between misdemeanors and felonies.

MR. SUAREZ. That is correct, Commissioner.

COMMISSIONER RUIZ. All right. Now, getting back to my original question, with relation to this training that takes place and in order to coordinate, the prisoner's first contact with the court is at the time of arraignment, and at that time of arraignment the accusation is made and the accusation appears before the court, whether it be an Indian court or a Federal court; is that not true?

MR. SUAREZ. That's right.

COMMISSIONER RUIZ. Now, would not a manual for purposes of referral, immediate referral, be valuable? I'm predicating this question upon—I'm from the city of Los Angeles. We have municipal courts; we have Federal courts; we have superior courts; we have 150 superior court judges. It's a very complicated setup. And there is a referral system with relation to civil matters, municipal court matters, with respect to law and motions. They have a master calendar. And this referral which is so complicated would reduce itself to two items here, as I understand it, and an identification of a major or minor crime, a misdemeanor or a felony. Would not a manual be valuable at the time of arraignment for the court to say I refer this case?

MR. SUAREZ. I believe, sir, that any written instruction in that regard would be quite beneficial. Indian courts for the most part are very sophisticated; however, they will hear only those matters that are presented to them.

The Major Crimes Act is very specific on which offenses are those within the purview of the Federal Government—rape, robbery, assault, murder, burglary, larceny, whatever they are. Very, very delicate. The fact comes, sir, and the problem arises is that once the offense has occurred and the police has already identified the person who committed the offense, there is a time gap between the time that the offense occurred and that the United States attorney makes a determination whether to prosecute or not.

COMMISSIONER RUIZ. That's before the arraignment, then.

MR. SUAREZ. Yes, sir.



COMMISSIONER RUIZ. In other words, the problem is then prior to the accusation?

MR. SUAREZ. Yes, sir.

COMMISSIONER RUIZ. This is where all of the problem is?

MR. SUAREZ. Yes, sir.

COMMISSIONER RUIZ. Is that correct?

MR. SUAREZ. [Nodding head.]

COMMISSIONER RUIZ. The detention facilities during that interim are negligible?

MR. SUAREZ. Well—

COMMISSIONER RUIZ. Is there a system of transportation? Once upon a time the transportation system was by horseback. Now we have very rapid transportation now. A person is arrested. Upon arrest he is detained. Upon detention he is either placed or not placed on bail, I assume; I don't know. Now, during this period of detention, would it not be simply a transportation problem?

MR. SUAREZ. Well, sir, once the United States attorney makes the decision to prosecute, a warrant is issued. A United States marshal most of the time will come to the reservation, arrest a man, take him back to the Federal detention center, wherever it may be. If it's late in the evening, he may detain that person in a private jail or in a local level jail. Ultimately, the prisoner, whomever he may be, will move back to wherever the marshal has the detention facilities.

Local jails, private jails, I would say, meet minimal standards. More than likely they would not meet the standards set by the Department of Justice, the Bureau of Prisons, across the board. Some will; some won't. It depends. But once that prisoner becomes a Federal prisoner, then he is remanded to the custody of the United States marshal who must—who always will move him off the reservation as quickly as he can.

COMMISSIONER RUIZ. Now, he's removed from the reservation and he's detained.

MR. SUAREZ. Yes, sir.

COMMISSIONER RUIZ. All right. He's not charged yet, then?

MR. SUAREZ. A warrant has been issued. Technically, he is under arrest with a warrant for his particular offense. If the offense occurred on a Friday, he may be taken if there's a magistrate around, quick arraignment. All of these things can be addressed a little bit better by the United States attorney.

COMMISSIONER RUIZ. I'm trying to fit in where this time lag is. Is an argument in the meantime going on between these different jurisdictions as to when next to proceed?

MR. SUAREZ. No, sir. No. I don't perceive an argument at that point.

MR. WING. No.

MR. SUAREZ. The problem is that from the time the victim lays on the ground, that the assailant is standing there, that the police go and make the investigation, until the time that the determination is made

by the office of the United States attorney whether to prosecute on the basis of a violation of a Federal law.

CHAIRMAN FLEMMING. During that period of time he's not under arrest?

MR. SUAREZ. No, sir, unless he's arrested for a clearly unrelated other offense. He may be arrested for disturbing the peace. He may be arrested for whatever. Some minor offense to detain him.

COMMISSIONER RUIZ. Well, isn't that the same problem confronting an urban area where you have non-Indians? I mean, I'm trying to figure out what the difference is. There is—go ahead.

MR. SUAREZ. Well, no, sir. I'm from Tucson, Arizona. I work in the department down there. If, in fact, we had a burglary at 3 in the afternoon, we can probably find a county attorney an hour later, and we can probably go up there and get a warrant right away, and maybe by 5 o'clock if we can find the guy he was already locked up.

In Indian country, once the offense occurs, we have to get authorization from the United States attorney whether to prosecute or whether to arrest that man or to proceed on the basis of a violation of a Federal law.

COMMISSIONER RUIZ. Then the delay comes in getting a warrant?

MR. SUAREZ. Getting authorization to proceed.

COMMISSIONER RUIZ. For a warrant?

MR. SUAREZ. Right, sir.

COMMISSIONER RUIZ. This is what it's all about right now.

CHAIRMAN FLEMMING. That may be a matter of days or weeks?

MR. SUAREZ. It has some delays, Mr. Chairman. There are some delays.

CHAIRMAN FLEMMING. Anything further, Manuel?

COMMISSIONER RUIZ. Yes. This delay that you're talking about in getting a warrant for arrest depends upon the authorization, then, of the Department of Justice or the Bureau of Indian Affairs?

MR. SUAREZ. No, sir, the United States attorney.

COMMISSIONER RUIZ. The United States attorney?

MR. SUAREZ. Right, sir, for that particular jurisdiction.

COMMISSIONER RUIZ. And it's the time lapse that you're talking about there, because it's Indian territory and the United States attorney is in—

MR. SUAREZ. He's away from the area.

COMMISSIONER RUIZ. Away from the area? It's a matter of transportation then by automobile.

MR. SUAREZ. Well, no, sir, not in that we could normally call the United States attorney. If it's a serious offense, very serious offense, the Bureau of Indian Affairs investigator and/or the FBI, or both, can call the United States attorney and say, "Hey, we have a murder here. We'd like to proceed on the basis of arresting this man for murder." All the facts are laid out to the United States attorney or whomever they're dealing with and they may authorize an arrest over the phone. They may.

In other instances the United States attorney may say, "I'd like to see the report." Well, if you're working on a case over the weekend—and I can only tell you from my experiences on some of the reservations—if the offense occurs on Friday afternoon, by the time you get the report typed up by the FBI agent, if you called him, comes to the reservation, helps to wrap the investigation, it may be Monday. By the time he goes back to his office and types up his report, it might be Monday night—might be. Then by the time it's all wrapped up and presented to the United States attorney, it might be Tuesday.

COMMISSIONER RUIZ. All right. If that happened in Phoenix, Arizona, how much time would be saved, given that it was over the weekend again?

MR. SUAREZ. I would suppose that there are probably district attorneys or county attorneys available in the city of Tucson or almost any other urban area that can go at almost anytime of the night and get an authorization to get a warrant.

COMMISSIONER RUIZ. Go to the judge and get authorization?

MR. SUAREZ. Well, go to the prosecutor.

COMMISSIONER RUIZ. Now, you say you would suppose. You said you would suppose. Now, do you know that?

MR. SUAREZ. Well, no, sir. I've been in Indian law enforcement for many years and I've been away from urban law enforcement for many years.

COMMISSIONER RUIZ. Can you answer that question, Mr. Wing?

MR. WING. Ah—

COMMISSIONER RUIZ. He said "suppose." Now, he's supposing. Does anybody know that?

MR. WING. I would have to address myself in the same way, from the supposing point of view. But I could only echo the concern of the Indian people saying that, in their opinion, there is this delay, and we don't have studies to pinpoint the delay, except from a narrative comment from the Indian leadership and those in the criminal justice system. They also point out that there is confusion on their part in perceiving a system that requires sometimes three different prosecutors—three different criminal investigators to review a particular case.

Also they pointed out that sometimes there's a considerable delay in the time before a decision is made, where a case that can be prosecuted will be brought before the tribal court, and all the time the Indian who has allegedly committed the offense is out on the streets. Those factors are recurring quite consistently.

And I think perhaps by talking directly with someone who would be in that aspect of the system—the United States attorney's office might clarify where the perceived gap is and reasons for it.

COMMISSIONER RUIZ. I have been informed that we have some United States attorneys here that probably will supplement this, and I have no further questions.

CHAIRMAN FLEMMING. Commissioner Horn.



VICE CHAIRMAN HORN. Let me just ask one question. The others I'll save for the U.S. attorneys since it's relevant to both panels.

Mr. Suarez, in terms of cross-deputization, does BIA have records as to the degree to which that has been authorized, and could you furnish those to the Commission—across the country and all reservations?

MR. SUAREZ. Yes, Mr. Horn, but it will take time to get them.

VICE CHAIRMAN HORN. All right. I'd like that as an insert in the record, the degree to which cross-deputization exists and with what agencies are we talking about. I take it it's strictly the Federal—the tribal police, plus the what?

MR. SUAREZ. Local units of government.

VICE CHAIRMAN HORN. Local units of government.

MR. SUAREZ. The sheriff department, whatever.

VICE CHAIRMAN HORN. If we could get that I think we need to know the extent. So we also need to know the degree to which it does not take place, in other words, out of the total number of possibility, how many situations are cross-deputized?

CHAIRMAN FLEMMING. Without objection, when that information is received it will be inserted in the record at this point.

Yes? Go right ahead.

MR. SUAREZ. It will take some time because we will have to make almost a county-by-county survey to find out which sheriff's office have applied for and received throughout Indian country, and that's going to take a little time.

VICE CHAIRMAN HORN. Yes. I think it's the only way we can really get at this problem, and the same way with the next panel. We have to get at just what are the facts if we can solve the problem.

CHAIRMAN FLEMMING. We appreciate very, very much your being with us. We appreciate your testimony and your response to questions. Thank you. Counsel will call the next witnesses.

MS. HUBER. Mr. Michael Hawkins, Mr. Robert T. O'Leary, Mr. William Youngman.

[Michael D. Hawkins, Robert T. O'Leary, and William Youngman were sworn.]

**TESTIMONY OF MICHAEL D. HAWKINS, U.S. ATTORNEY, ARIZONA; ROBERT T. O'LEARY, U.S. ATTORNEY, MONTANA; AND WILLIAM YOUNGMAN, ASSISTANT U.S. ATTORNEY, OREGON**

MS. HUBER. Would each of you gentlemen please state your name and position and also list the Indian reservations within your district over which you have law enforcement responsibilities?

MR. HAWKINS. My name is Michael D. Hawkins. I'm the United States Attorney for the District of Arizona. I have 17 separate Indian nations within my border. I have provided written comments to the Commission. Attached to those comments are a map and a list of those Indian reservations.

MS. HUBER. Thank you.

MR. O'LEARY. My name is Robert T. O'Leary. I'm the United States attorney for Montana. We have seven Indian reservations within our jurisdiction in Montana, approximately 37,000 Indians residing within the boundaries of those Indian reservations; six of them the Federal Government has exclusive jurisdiction over. One of them has opted out about 10 years ago for the 280 legislation, and the State of Montana has criminal jurisdiction over that reservation, although we do a considerable amount of civil work on that reservation as well.

MR. YOUNGMAN. My name is William Youngman. I'm an assistant United States attorney for Oregon. We have one reservation in Oregon which is under Federal jurisdiction, and that's the Warm Springs, with 2,500 members.

MS. HUBER. Mr. Hawkins—and perhaps you can move the microphone a little closer—we understand that when you assumed your position that you developed prosecutorial guidelines for major crimes, offenses, occurring on the Indian reservations in your district, setting out minimal levels of criminal conduct necessary to warrant Federal prosecution, and also addressing investigative responsibilities—

CHAIRMAN FLEMMING. If I could interrupt just a moment. Mr. Hawkins said that he had prepared a statement for the Commission. I assume that you want to insert the full text of that statement in the record at this particular point, and without objection that will be done. Pardon me.

MS. HUBER. And—

MR. HAWKINS. The answer to your question is yes, and those guidelines are attached to my prepared remarks. They were put into effect on a trial basis within the Navajo Nation in August of 1977, on a trial basis. They were tried for a period of about 120 days. They were modified in certain minor respects after that 120-day period.

They're now in effect permanently within the boundaries of that nation, and also 14 of the other Indian nations within Arizona. I might add that the Navajo Nation also spills over into two other districts, and we were able to secure the agreement of the U.S. attorney from New Mexico and Utah and adopt these prosecutorial guidelines. And so they are now uniformly in effect throughout the Navajo Nation.

MS. HUBER. Just backing up a bit, when did you assume your position as United States attorney for Arizona?

MR. HAWKINS. I was court-appointed on February 20, 1977, and I assumed office as a Presidential appointee on June 3, 1977.

MS. HUBER. When you took office what were your impressions as to major crimes investigations and prosecutions in Arizona and the system as you found it when you took office?

MR. HAWKINS. Well, the single most dramatic thing I think I saw was significant duplication and overlap of the law enforcement services being offered either by tribal police agencies, the Bureau of Indian Affairs Law Enforcement Services, and the FBI.

I found instances, for example, where three separate reports were being prepared by three separate agencies, witnesses being interviewed three and four times by different agencies—no sense, no standards, no guidelines as to the referral of those reports, nothing beyond informal understandings between individuals about investigative jurisdictions between the agencies. I felt a compelling need, at least on my part, to deal with that situation.

We began with the Navajo Nation, America's largest tribe, and has a fairly sophisticated tribal government and its own very independent, well-trained police force, its own independent judiciary, and they have a real willingness to deal with the problem. So we began there and then moved on to the other Indian nations.

MS. HUBER. What was the process by which you obtained input from the tribal governments during the time you were developing your guidelines?

MR. HAWKINS. I met with them and their law enforcement leaders. The Navajo guidelines were drafted after a series of meetings occurring in Window Rock, Flagstaff, Winslow, and Holbrook, Arizona, with representatives of the tribal police and Bureau of Indian Affairs officers and the FBI and myself. Once the new U.S. attorney took office in New Mexico, he had input in the problem and then on a continuing basis thereafter.

MS. HUBER. Why did you feel it was desirable to obtain tribal input in the development of the guidelines?

MR. HAWKINS. At least from my point of view, I see the development of these jurisdictional guidelines as one step in what I believe to be the entirely proper expansion of investigative responsibility by tribal police agencies. Plus just a general belief that you don't secure cooperation with guidelines simply by making edicts. You need the cooperation of the people involved. And one of the side benefits we hoped to obtain, and I believe have obtained, by the issuance of these guidelines was cooperation and communication between all levels of law enforcement.

MS. HUBER. How was the use of the guidelines worked out in practice since they have been in effect?

MR. HAWKINS. I think they work very well.

MS. HUBER. Could you describe some of your experiences?

MR. HAWKINS. Well, one clear example of how well they worked is that we wanted to wait about a year to put them into effect within other Indian nations and we were sought out after the experience within the Navajo Nation to affirmatively put them into effect within other Indian nations in the State. They work very well.

I think the principal benefits that have occurred is that we now have direct reporting and clearly defined crimes by tribal agencies, the BIA, and the FBI. There's no overlap in the reports; single investigations are done; single interviews of witnesses to crimes are done.



It has enhanced significantly the direct relationship between tribal police officers and our own officers. They are now more intimately involved in what we do. They participate in grand jury proceedings, in trial proceedings, and they are a tremendous help and benefit to overcome language and cultural and experience barriers that may exist between Anglo prosecutors and crimes which involve inhabitants or members of various Indian nations.

MS. HUBER. How has that, in your view, affected the quality of law enforcement on the Indian reservations in your district?

MR. HAWKINS. Well, I'm on the giving end of that equation, not the receiving end. I think that would be a question that would be more factually answered by people on the receiving end. But from my point of view, the comments that I've received, solicited, and have been brought forward to me, it's worked very well. There are minor disagreements from time to time; sometimes they can be resolved amicably, and sometimes there's grumbling that goes on for a while. But I think by and large they have worked very well.

And the relationships among all agencies offering services to the Indian nations in Arizona are much better today than they were 2 years ago.

MS. HUBER. Mr. Hawkins, was this establishment of guidelines something that you undertook on your own initiative, or was this something that came from the Washington level down to you?

MR. HAWKINS. It was on my own, but within 2 or 3 weeks after taking office I met with then Assistant Attorney General Civiletti, now Deputy Attorney General, and he asked for my assessment of some of the problems that we faced in Federal law enforcement in Arizona. That was high on my list, and I told him what I thought the problems were and how I wanted to deal with them. And he said by all means proceed and proceed boldly and do what you think is necessary to solve the problems on your district level. But beyond that it was my own initiative.

MS. HUBER. This is not a matter that at that time or presently is covered within the *U.S. Attorney's Manual* or in any other policy statements of the Department?

MR. HAWKINS. No, I think there's been general encouragement by the Department to work cooperatively to the solution of some of these problems, some that you heard described in earlier testimony. But my own sense, impression, is that it's like the relationship of federalism between the Federal Government and various States; there's a sensible attitude that ought to be taken here, and that is that what works on reservation "Y", won't work necessarily on reservation "X," it needs to be approached differently.

The Navajo Nation, which has 150,000-200,000 members and is in three States, and occupies 2 million square acres of land, and has a budget of hundreds of millions of dollars, is an entirely different reservation than the Havasupai whose 400 members live at the bottom of

the Grand Canyon and they still don't have electricity and depend upon mule trains to bring in food and that sort of thing.

I think that's a sense, impression, and I'm not sure what good—if it's responsive to your question—national policy guidelines would have. Our problems are different from the problems of Montana, and their problems are different from the problems in Oregon. I think they need to be approached individually.

MS. HUBER. Mr. O'Leary, can you tell us something about the way you handle your major crimes prosecution and investigation responsibilities in the State of Montana, and particularly any logistical situations that you have there that affects those responsibilities?

MR. O'LEARY. Well, first of all, let me say that during the 1960s I was an assistant for approximately 8 years, including the first assistant for about 3 of those 8 years. I returned in 1977 as U.S. attorney. So I did have some background and experience in dealing with the Federal prosecution in Montana, particularly those on the Indian reservations.

We have only six assistants in Montana. My headquarters is at Butte, and I have three attorneys there and three in Billings, and very frankly I think that the delivery of law enforcement in Montana has vastly improved over the period of the 1960s primarily because of the developments, as I see it, of more adequately trained Indian and tribal law enforcement officers and actually better cooperation with the FBI in the delivery of the law enforcement to the Indian reservations.

We really don't seem to have some of the problems that were outlined by Mr. Suarez because we deal very little with the BIA and their special officers, other than on hunting and fishing and trespass-type violations. We primarily rely on the Indian tribal police to notify the FBI of any violations that occur on the respective tribal lands and reservations. And on every reservation we have a part-time U.S. magistrate.

The delay in the delivery of prosecutive opinion that was outlined by Mr. Suarez, I don't think is necessarily valid in Montana. I visited with every single tribe, almost all of the tribal police in Montana, tribal leaders, and found little complaint about the delay, if any, on a prosecutive opinion given by a United States attorney or by one of my assistants.

It seems to me that the problems of delay have been overcome almost entirely by the Speedy Trial Act, number one, and number two, by the fact that there are U.S. magistrates—part-time, granted—on or near every reservation in Montana.

Usually—and the declination rate, of course, is as high in Montana as I'm sure it is in Arizona and Oregon. usually if a prosecution request is made by the FBI or even—directly by a tribal police officer, in the event of a major crime, to any assistant on the weekend or any other time—a decision is made almost immediately, granted that the facts are complete and the offense has been committed, and the offender can be identified.

And the decision to prosecute really doesn't tolerate, I don't think, any substantial delay. Occasionally, because of the Speedy Trial Act and our reluctance to have assistants travel long distances for preliminary hearings, we'll require a report or will require the case be set for the next succeeding grand jury, which in Montana meets about every 2 months.

But in those cases, generally speaking, we find that the tribal police have already taken the individual into custody on some tribal-type offense.

In Montana, for example, I counted up just a little while ago, there are 23 or 24 tribal offenses that generally cover the broad range of most criminal activity, albeit they are misdemeanors. And generally speaking the tribal police are on the investigation of an assault, murder, robbery, or larceny, whatever the case might be, will already have taken the individual into custody, into tribal custody.

Then the call is made to the FBI agent who is servicing that particular tribe. Agents in Montana are stationed at or near all of the reservations.

MS. HUBER. Are they stationed on the reservations?

MR. O'LEARY. On three of the reservations, yes. There are FBI agents in Glasgow for the Fort Peck and the Fort Belknap Indian Reservations; in Cutbank for the Black Feet Indian Reservation; in Billings, which is close to the Crow, 45 miles into the Northern Cheyenne. So there are FBI agents available with a very short period of time to all of those three major reservations where most of the criminal conduct that we're talking about in Montana occurs.

I frankly don't see the delay referred to by Mr. Suarez, and I feel that the major problem that I find on the reservations in Montana is the handling of juvenile offenders because the tribes and the BIA have absolutely no system in Montana for the detention or the handling of juvenile offenders.

Federal judges in Montana are reluctant to put them into the Federal system, into the process of the Federal court where they have to be transported to Billings, Butte, Great Falls, or one of the locations where they are held in custody, and then depending on the disposition by the courts, return to the reservation where there are no facilities whatever in Montana for handling juvenile offenders, or referred to State-type institutions where the cost of custody, confinement, separation from family and from their tribal heritage and their tribal life is severe on the juveniles.

It seems to me, to be very blunt about it, that a lot of money that's been spent over the years on the Indian reservations could be better spent with putting together a juvenile training and detention program.

MS. HUBER. Thank you. We understand that you do not operate under a system of prosecutorial guidelines in Montana. How do you go about exercising—you and your assistants—go about exercising your discretion as to whether to accept a major crimes case for Federal prosecution or not?



MR. O'LEARY. We don't have prosecutorial guidelines in Montana primarily because the seven, the six reservations that we have jurisdiction over are widely separated in Montana; the largest of those reservations contains about 4,500 Indians.

We find that if you have prosecutorial guidelines where you're going to automatically decline certain types of cases, either on a monetary limit basis or because of the nature of the offense, that the tribal organization—the Blackfeet, the Crows, the Cheyenne, whatever it might be—are really not being—the violations are not being handled adequately at the tribal level. Because if they are major crimes we feel that Montana, due to the small population on the individual reservations, that we can take the time to make an individual determination as to whether or not to prosecute any particular major crime.

Then, of course, in Montana as well as in the other States, we also get involved in prosecutions under the Assimilated Crimes Act, and prosecutions where the offense may well be a major crime. But we have a magistrate system that try to tell you the offenses, and we may determine, depending on the quality of the tribal court system, defer or refer cases for prosecution on a petty offense basis before a U. S. magistrate, which seems to us at times has more of an impact on the law enforcement on a reservation than referring it back to the tribal court.

I'm not being critical of the tribal court system as such, but only critical of the turnover in both the tribal police and the tribal judges on the various Indian reservations in Montana and the lack of continuity and consistency in the delivery of tribal justice. We find it's better to go the other route sometimes.

MS. HUBER. Do you find the tribal justice systems different in quality from other rural justice systems under the State, in some of the rural areas, rural counties?

MR. O'LEARY. It's hard for me to say as far as the State, the rural areas of the States, because I really don't have much familiarity with the rural, small-county justice system in Montana.

The tribal court system and the tribal police system in Montana seem to have a heavy turnover, and the turnover usually coincides with the change in representation on the tribal council and who is in control of the tribal government from time to time. We are finding problems there because of the heavy turnover and the lack of continuity.

MS. HUBER. Thank you. Mr. Youngman, how do you go about exercising your discretion in the district of Oregon as to whether to accept a major crimes case for prosecution?

MR. YOUNGMAN. As I said, we have only the one reservation under Federal jurisdiction, and I'm the only person from my office who does any work there on major crimes. I do it pretty much the same way they do in Montana, on a case-by-case basis.

MS. HUBER. Do you consult with anyone before exercising your jurisdiction?

MR. YOUNGMAN. Yes, our operation is small enough so that I can actually go to the reservation and talk with the tribal police chief, the tribal judge, the tribal probation officer, with input from the FBI and the BIA. We then as a group decide which case will be prosecuted federally and which will stay with the tribe.

MS. HUBER. Mr. Hawkins, in Arizona, do you find the same problem expressed by Mr. O'Leary of the tribe not picking up and prosecuting cases that you refer back to them?

MR. HAWKINS. I would describe that as a minor problem, and perhaps very minor. The guideline system that we have in operation has internal protections to ensure that initially the cases that are automatically deferred by those guidelines go to tribal authorities that provide sort of a checkoff and self-protection system whereby, if they come to us and they are declined from either the FBI or the BIA, that they are returned to tribal authorities.

We try to maintain good communicative relationships with tribal prosecutors. So I would describe it as a minor problem. And we have tried to deal with it on a systems basis so there are protections within the system and these cases are referred back.

MS. HUBER. And you're relatively satisfied with the system of referring cases back to the tribal court?

MR. HAWKINS. I am.

MS. HUBER. It's picked up—

MR. HAWKINS. I am, but again, to find out whether they within the Indian nations are, you'll probably have to talk to them, and I've had no negative feedback and, in fact, a lot of positive feedback.

MS. HUBER. Mr. Youngman, I'd like your comments as to Oregon, whether the tribal court at Warm Springs tend to pick up the cases that you refer back to them?

MR. YOUNGMAN. Yes. As soon as I make a decision not to prosecute, they pick up the case and immediately start prosecution. I have a system where by the end of the month I send reports of the declined cases to the probation office of the tribal court or the tribal police. We've had no problems.

MS. HUBER. Mr. Hawkins, will you in certain circumstances accept referrals for Federal prosecution directly from tribal police or BIA police rather than from the FBI?

MR. HAWKINS. Yes. And we found that the report-writing abilities of tribal police officers and BIA law enforcement specialists have improved as a result. That's not to say that there weren't problems initially, and particularly when you're dealing with the language barrier and terminology barrier. But it increased their proficiency in the report-writing immensely. And I think both sides have benefited by it.

MS. HUBER. How have you found the quality of tribal police investigation and also their reporting and preparation of cases?

MR. HAWKINS. It varies greatly from reservation to reservation, the Navajo reservation has their own police force. They have for a long

time. They have their own police academy. It's one of the best thought of, I think, in the country. Other police agencies send their officers to it. They have a high preponderance of supervisors who either have attended the BIA training course at Glenco, Georgia, or the FBI National Academy at Quantico, Virginia.

Until very recently they were under Anglo leadership, but their new leader tribal superintendent—they do not call them chief—is Lieutenant Colonel Banally who is a native Navajo. They have an excellent police department.

It depends on training and resources and the number of people that are available. On some reservations there is a merged law enforcement. For example, the San Carlos Apache have merged tribal law enforcement with the BIA law enforcement. They feel that beat-level officers are basically members of the San Carlos tribe, the leadership is BIA people—generally Native Americans, but from other tribes.

I find that there is a general good quality of work; in some reservations it's excellent compared with any city police department of modern size anywhere in the country. On others it's just a matter of training and the availability of funds.

MS. HUBER. Mr. O'Leary, in the district of Montana will you ever accept referrals for prosecution from the BIA or tribal police authorities rather than having it also go through the FBI?

MR. O'LEARY. We do accept referral from the BIA special officers on 1165 violations, hunting and fishing violations on Indian reservations.

MS. HUBER. How about major crimes?

MR. O'LEARY. Other than that, we have not, either in the past or at the present, because I find that the quality of the investigation by the BIA is inadequate. I find that the Indian tribes generally have little confidence in the BIA and their special officers. Whereas I believe, contrary to Mr. Suarez, that the Indian tribes and the residents on the reservations do have confidence in the FBI and the FBI investigations, and the independence of the FBI, the independence, I believe, of my office in making a decision which is not colored in any way by any connection with the operation or the overall administration of the Indian reservations.

With respect to the tribal police, in three of the reservations we have made every effort to encourage the tribal police forces to submit their written reports to us on any case that has been accepted for prosecution, to bring the tribal officers to the grand jury, make them a part of the full prosecution system, because I feel it makes a better operation for them as tribal policemen as far as participating in the system from the beginning to the end. And it also encourages cooperation between the FBI and the tribal policemen who, frankly, get together at grand jury, get together with us, kick around their problems, have the freedom to discuss it with myself and my assistants, and we found it to be very helpful as far as the law enforcement on the three major reservations in Montana.



MS. HUBER. What you described as involving the tribal police in the prosecutorial process, could you see a time in the future where you would accept their referrals and their written reports directly, rather than adding the FBI into it?

MR. O'LEARY. Right now I don't see that, but perhaps in the future if there was more continuity in the tribal police organizations and they had adequate training—if some type of system was set up such as the Metropolitan Police Law in Montana where they have guaranteed tenure on the job and retirement, I think then if they were professionalized in that fashion, we would be more than willing to accept their direct referrals and to act on their requests for prosecution assistance. But right now I don't see it.

MS. HUBER. Turning to another area—Mr. Youngman, how about yourself? In Oregon, will you ever accept referrals directly from the tribal or BIA police on the Warm Springs reservation?

MR. YOUNGMAN. It depends entirely on who holds the position of Agency Special Officer. I have in the past. I prefer not to in our operation because it's small enough that the FBI does get in very quickly on each case. So I prefer not to.

MS. HUBER. Turning to another subject, beginning with Mr. Youngman, at this time in your district how are cases being handled of non-Indians who may commit minor offenses on the Warm Springs reservation?

MR. YOUNGMAN. Well, even before *Oliphant*, the *Oliphant* decision, our tribal police would cross-deputize in all three counties in which the reservation lies. Traffic matters are routinely referred by the tribal police officers to the county in which the offense was committed. Minor white-on-white violations go to the county where the tribal police officer is doing the referring.

We have, for instance, resorts on the Warm Springs reservation, and if guests at the resorts that are non-Indian commit minor crimes, such as vandalism or minor assaults, and the tribe or tribal member is the victim, I will pick up those cases. But we did not have a problem prior to *Oliphant*, and we don't have a problem now.

MS. HUBER. Mr. O'Leary, in Montana how are offenses committed by non-Indians on Indian reservations handled or not handled?

MR. O'LEARY. Although we were surprised after the *Oliphant* decision to find that little or no problem had occurred, I still have to say that in most of the Indian reservations in Montana, there are incorporated cities or towns within the reservation, and the State and local law enforcement have taken care of the problems of non-Indian petty or minor offenses, as they did in the past involving non-Indians, of course.

We do find from time to time the tribal police will make the initial arrest, turn them over to the local deputy sheriff or the local city or town police, and we haven't really found a problem with it.

MS. HUBER. Are there cooperative arrangements all through the States, or are there some counties or some tribal governments where there is some difficulty?

MR. O'LEARY. There's one area where there's some difficulty, and it's primarily because the BIA has opposed the cross-deputization of the tribal police and the local deputy sheriffs. That's in Poplar, Montana.

But I believe with the new sheriff in that county that that problem is being worked out also. Some of the animosity that existed before has been overcome. Generally speaking, it's the kind of thing that you have to depend on the local people, both tribal and county or city to work out the problems. And if they could be encouraged to do so, ordinarily by sitting down and talking about their mutual problems, they've been able to overcome the jealousy and some of the distrust that just naturally occurs in these small communities where Indian tribes are a major part of the population.

MS. HUBER. Mr. Hawkins, in your district how are cases being handled—offenses committed by non-Indians?

MR. HAWKINS. It might sound like a broken record, but, again, it's on a reservation-by-reservation basis. Those Indian nations that have traditionally enjoyed good relationships with the State and local authorities that surround them or near them, we've been able to encourage cross-deputization on those.

MS. HUBER. Have you as U.S. attorney used your good offices to encourage a cooperative arrangement?

MR. HAWKINS. Yes I have, for very pragmatic reasons. It's like the thumb-in-the-dike-type situation. I know if I don't go out and find affirmative ways short of reference to my office or district court to deal with these problems, they'll be back on our doorsteps. My own sort of horseback statistic-gathering for 1978 indicates that we have had about 4,000 additional cases in our system. We simply could not have handled this without some alternative means.

So, yes, I have gone out and sought local prosecutors and police agencies to cross-deputize and to cross-designate tribal judges, for example, as local justices of the peace in a pooling arrangement. I might add as a footnote here the problem of quality of report-writing and police professionalism and the problem of cross-deputization are not unrelated. In fact, in my judgment, they are interrelated.

In many States in order for cross-deputization locally to occur, tribal police officers must meet certain certification standards. They are beginning to do that in cross-deputization and the need for it because *Oliphant* will enhance that and will enhance the professionalism of tribal police officers.

On those reservations where the relationships are strained, we have gone to a system of where we can secure the cooperation of BIA for cross-deputization of tribal officers so that citations in the magistrate's court can be issued, and things are usually handled on a misdemeanor

level in the magistrate's court. Either the part-time magistrate—or we have nine of them outside the major urban areas in Arizona—and sometimes where trials are necessary, they are referred to magistrate courts in the urban areas.

I might add that Mr. Suarez—and I'm sorry he's gone—made the comment about—one of the suggestions he had was that there be the increased use of U.S. magistrates within Indian nations, and I should point out to you that I would be remiss if I didn't tell you that in some Indian nations they view that as a very much a threat to their own sovereignty; they're not in favor of it. They would prefer as a better alternative to see their own tribal judges given authority under 18 U.S.C. 3041 to become magistrates and to hold preliminary hearings and that sort of thing, rather than have an outsider come from off the reservation; and because of the attorney and the experience and no-conflict requirements, it very often mandates a person from outside the reservation.

MS. HUBER. From your perspective, is the current circumstances in the state of the law such that Indian communities are adequately protected from offenses committed by non-Indians?

MR. HAWKINS. NO. Not in my judgment. In my judgment—and I do not express that—herein follows a disclaimer—I'm not expressing the policies of the Department of Justice nationally.

In my view there's a felt need to legislatively overrule *Oliphant*, the March 6, 1976, decision of the U.S. Supreme Court. Justice Rehnquist's opinion makes it clear that it's founded on a legislative basis. I think it should be overruled and made clear that Indian nations do indeed, provided there are adequate due process protections, have criminal jurisdiction over non-Indians; that lies fundamentally on a consent basis.

Most of the people that are coming into Indian country in Arizona are coming there because they want to take advantage of recreational opportunities or the like, and they are coming there because they want to take advantage of the scenery. And when they drive improperly and drink improperly and offend the good peace and order in the community, then that community ought to be able to deal with them. But that's a policy question.

MS. HUBER. I have no further questions at this time, Mr. Chairman.

CHAIRMAN FLEMMING. Commissioner Horn.

VICE CHAIRMAN HORN. Gentlemen, I'd like your suggestion as to how we might best get at through the Department of Justice—and maybe we have to leave it to our counsel—certain facts that will help this Commission reach conclusions about the degree to which service is provided reservations in terms of law enforcement. For example, a discussion has occurred about whether FBI agents are located on or off the reservation. If off, how close? Are contacts made by telephone? Do you have to see the reports in writing and so forth?



What I'd like to suggest to counsel is that you pursue exhibits with the Department of Justice and specific U.S. attorneys, perhaps not asking every U.S. attorney, but maybe taking the top 20 reservations in the United States in terms of declining population from the largest to the smallest, or at least taking the top reservations in all Western States and ask some of these questions.

One is, what is the location of the FBI, the closest FBI station in relation to the reservation? What is the location of the closest United States attorney or an agent of the United States attorney in relation to the major population center on the reservation?

I think if we get at some of those distance questions and some of the practices we'll be better able to judge what is occurring. I wonder if counsel has any other plans along that line? What are your plans?

MR. ALEXANDER. We have data. Some of that data is publicly available and we do have data request for information of that nature into the Department and into the FBI which will be utilized.

VICE CHAIRMAN HORN. Okay, that's all I really want to know.

MR. HAWKINS. Mr. Horn, if I may respond to, at least in part, to the question you raised.

VICE CHAIRMAN HORN. Yes.

MR. HAWKINS. The FBI is not unaware of the problems. I brought to their attention, for example, the problem in Arizona of an agent responsible for the Navajo Nation residing in Flagstaff. In some cases the response time was 2 hours, 3 hours; in a bad snowstorm, maybe 2 or 3 days. We were able to change districts and have the FBI agent from Gallup or Farmington, New Mexico, be responsible for the Eastern half of the Navajo Nation. The FBI is aware of that and they have been responsive to it.

There's sort of a philosophic and policy problem in the eyes of many with stationing FBI agents within Indian country, and—

VICE CHAIRMAN HORN. That's what I'd really like to explore, Mr. Hawkins, because that will be my next question, the degree to which language poses a problem here. When an FBI agent is writing a report, who is interpreting? How do we know the translation is accurate, etc., etc. And I'd like your reflections on this philosophical point of should an agent be physically stationed with family on the reservation? Should they be off the reservation? What are the pros and cons?

MR. HAWKINS. I think it depends, again, on the reservation, those that are more urbanized and have communities within them, I think it makes some sense to have all Federal investigative personnel live at or near the Indian community. Where it's a large, expansive, almost nomadic reservation of the type of the Navajo, it probably makes less sense to have them there—particularly where you have ongoing investigations, and there are problems from time to time with the integrity of Navajo and other administrative people, and there have to be investigations sometimes of the tribal organizations themselves.

You secure more independence and professionalism in my view by having these people removed. With regard to the language problem, there is a significant problem, in the FBI to a lesser extent than the BIA, with the recruitment of Native American agents. To my knowledge there is one FBI agent who is a native Navajo, Michael Ness, and he is located in Gallup, New Mexico, and screens a good deal of the investigations that come off the Navajo reservation.

I think Judge Webster has recognized this and there's an effort going on to recruit them, but that is a problem. There is no two ways about it. One aspect of that problem, I believe, would be solved with increasing responsibilities given to tribal police officers, so that immediate interaction and interfaces between tribal officers and FBI agents, and the tribal officers are of the tribe and speak the language and know the common experience. They can aid the FBI in their major crime investigations.

VICE CHAIRMAN HORN. Any of you other gentlemen have comments on the problem of whether agents should be located on the reservation and what the problem of translation/interpretation are, etc.?

MR. O'LEARY. We have very little problems of translation and interpretation in Montana. As I said earlier, near the three major largest reservations in Montana, FBI agents are located. I find my own view to be, and I think it coincides with the existing policy of the FBI, is to station them not directly at the agency headquarters, but in a community near the agency or near the reservation, because of the problem of investigating the tribal operations, and in every reservation. In Montana there's an ongoing investigation at the present time involving the misuse of tribal funds, fraud in federally-financed programs, that kind of thing. I feel they have more independence and more objectivity if they are not so directly connected with the tribal operation by being stationed at agency headquarters.

The big problem we find with the FBI is the priorities nationally of the FBI don't include priorities for law enforcement on Indian reservations. The priorities set by the administration and the FBI are white-collar, organized crime, racketeering, and national security. And we find a problem with numbers of FBI agents to service the reservations. I don't know what the answer to that is other than an adjustment of FBI and administration priority because we're not able to accomplish that by ourselves.

VICE CHAIRMAN HORN. That's interesting, because I'm aware that they did change the policy and said let's quit getting every individual bank robber, let's leave that to local police and let's concentrate on white-collar crime, organized crime, etc. I think we all know that a game was played for many years with Congress where auto thievery and other crimes made the FBI look good in terms of gigantic statistics, but meanwhile organized crime ran rampant in the United States.



So you feel that this has come down in relation to Indian reservations that have unique problems where the FBI has to be involved as a Federal presence, and that this policy is not sorted out yet?

MR. O'LEARY. I strongly feel that way because I'm aware of the number game also, and the stolen cars and the value of the automobiles, and that kind of thing, that was done for many years. But with Indian reservations and where the Government has exclusive criminal jurisdiction over major crimes and where the FBI is the major investigative unit on those reservations and responsible for the investigation, it seems to me the priorities should be adjusted to take that into account, notwithstanding the fact that organized crime, racketeering, those types of major offenses, white-collar crime, are very important and should be prioritized too.

VICE CHAIRMAN HORN. Any other thoughts, Mr. Youngman?

MR. YOUNGMAN. No, I think I agree with what's been said.

MR. HAWKINS. My comment is simply, Mr. Horn, to underline that, in the rush to improve the quality of cases that we as United States attorneys do nationally, a quite proper rush in my view, it is forgotten that as to major felony criminal activities occurring in Indian country that we have no other place to go but the Federal court system, and there's no other prosecutor involved but the U.S. attorney.

We can defer a bank robbery to local authorities. We can defer some type of securities fraud to State attorney general offices. We can't refer out rape and aggravated assault and murder that occur on Indian reservations. They must be done in that respect. We occupy a position of—like the district attorney or county attorney to the Indian nation. We have a closer and more trust underlying responsibility to undertake. And in some instances that is forgotten in the rush to achieve these national priorities.

VICE CHAIRMAN HORN. I'm curious, counsel Mr. Alexander, in terms of that point, are we gathering the data which will show the degree to which a particular U.S. attorney's offices have primarily, or what proportion they have of Indian-related offenses as opposed to non-Indian related offenses?

MR. ALEXANDER. Again, some of that data is publicly available and we are gathering updates on that.

MR. O'LEARY. Mr. Horn, in response to that question, the Department of Justice has the individual statistics on a monthly computer printout for every U.S. attorney's office. We could tell at a glance what we are doing with respect to Indian and non-Indian crimes. For example, last year we had—about 60 percent of our criminal prosecution was on Indian offenses and 40 percent on non-Indian offenses. It's very easy to find that out.

CHAIRMAN FLEMMING. Commissioner Freeman?

COMMISSIONER FREEMAN. Mr. O'Leary, would the Justice Department have any record of offenses that were committed by non-Indians on the reservations and for which there was no action taken?

MR. O'LEARY. By non-Indians on the reservations?



COMMISSIONER FREEMAN. Right.

MR. O'LEARY. I don't believe they do, Ms. Freeman, except by individual U.S. attorney's offices. We kept no separate statistical record of non-Indian offenses. We do keep a separate record of prosecutions, declinations, and juvenile on the Indian reservations.

COMMISSIONER FREEMAN. So that we have a situation where a non-Indian may come onto the reservation, commit an offense, not be subject to the jurisdiction of the reservation law enforcement officials, and that there is an area in which this person would not be subject to any kind of punishment, detention whatsoever, and no records are kept?

MR. O'LEARY. I think that really happens, but I doubt very seriously if it happens on any broad-scale basis because the tribal police or the tribal council or the tribal chairman would be quick to point out to us, at least in Montana, that they have non-Indian violations, such as trespasses, disorderly conduct, drunken disturbance, that they're not being able to handle by cooperation with the local authorities.

COMMISSIONER FREEMAN. Well, in the previous hearings which this Commission has held in at least two other communities, this was a charge from the Indians, which of course creates a very volatile situation if a white person is above the law and can come in and commit offenses and harm persons without any recourse. This further diminishes any respect for the system of American jurisprudence.

MR. O'LEARY. I can only say that after the *Oliphant* decision we made a point of advising each of the Indian reservations that we have jurisdiction over, and their tribal police and tribal council to report any problems they're having with prosecution of non-Indian offenders. We only have one complaint that has been made and that involved a trespass of a non-Indian in an Indian home. So I can't say anything else except that they are not reported.

COMMISSIONER FREEMAN. This leads me to the further point and that is I'm further troubled by the statement by Mr. Hawkins that it is his opinion that the *Oliphant* decision should certainly not be sustained, but that it is not the policy of the Justice Department. It would seem to me that the chief law enforcement office of the United States ought to at least have a policy to at least recommend changes where necessary with respect to law.

MR. HAWKINS. May I respond to that, Commissioner?

I simply put at the front of my remarks that I didn't express a national policy point of view. I'm simply responsible for one district. I should point out to you that the Department of Justice and Judge Bell strongly endorsed and pushed to the extent they could through Congress the criminal code revision bill last year, which included provisions that would have legislatively overruled the *Oliphant* decision and also would have allowed those tribes that are currently under section 208, the jurisdiction, to come back under their own jurisdiction.

And I have every reason to believe that the new criminal code revision bill which Senator Kennedy will bring up again this year will con-

tain those provisions. So the Department of Justice is on record, I believe, as supporting a legislative change to correct that problem.

COMMISSIONER FREEMAN. Well, I'm very glad you put that in the record, Mr. Hawkins, because it is—one final question I'd like to ask each of you. And that is what contacts you in your official capacities have with the tribal leadership of each—of all of the reservations under your jurisdiction and the tribal judges?

MR. O'LEARY. Well, in Montana, at least, with each new tribal council and each new tribal chairman that is named, I have tried to visit each of those reservations, although I have to admit I have not made the last two of the small reservations where we have little or no criminal activity reported from, to visit with the tribal council and the tribal chairman, and to, at least with the tribal judges, advise them that we are available and my assistants are available to give them any advice or assistance that they need.

And two of the tribes routinely—the tribal court system and tribal prosecutors—they call on our office for assistance and ask questions of a varying nature, particularly with respect to jurisdiction and the elements of offenses that they are having trouble with determining whether or not an offense has been actually committed and that kind of thing.

So they are encouraged to do it. One of the problems, as I said earlier, is the tremendous turnover in both tribal courts and tribal police organizations because of the changes in the majority of the tribal government.

Most of the tribes have their elections every 2 years. Some of the tribes in Montana, although they have constitutions under the Indian Review Organization Act, they meet on a quarterly basis and all tribal business is conducted at the tribal quarterly meeting. And it's really difficult to have any kind of organization continuity with that kind of a system.

VICE CHAIRMAN HORN. Could I pursue that a minute? What you're saying, I take it, or implying is that with the tribal elections every 2 years, tribal police are really a patronage organization and the side that wins then gets to replace the police force.

MR. O'LEARY. Exactly.

VICE CHAIRMAN HORN. That's your experience in Montana. Is that your experience in Arizona?

MR. HAWKINS. A broken record again. It depends on the tribe.

VICE CHAIRMAN HORN. Yeah.

MR. HAWKINS. The Navajo Reservation, the White River Apache Reservation, the San Carlos Apache, the Papago, Ochin, Gila River, Salt River police departments are professional. There have been some changes in administration, but there's been very little variance. In other areas, the new administration comes in and the old ones are swept out.

VICE CHAIRMAN HORN. Well, I guess we ought to get from BIA just the degree to which these tribal police forces are professionalized or are not professionalized. It seems to me that's part of the picture and part of the problem. Counsel, can we get that at this point in the record?

CHAIRMAN FLEMMING. Without objection, we will insert it in the record at this point.

I don't know whether the other members of the panel wanted to respond to Commissioner Freeman's question. Of course, Mr. Hawkins had already described that in connection with the development of his guidelines. And so, Mr. Youngman, do you wish to respond?

MR. YOUNGMAN. Yes, sir, I would like to respond. We have perhaps an ideal situation in Oregon because we have a tribe that is friendly to our office and ones that work with us. I think that anywhere in the country the personal relationship could be developed. It's the best possible way the relationship could work.

I go to the reservation at least once a month, and I have almost daily telephone contact. I attend law and order committee meetings as often as a speaker, and I find that it is much easier to deal on a personal level with sending the same representative from the government each time to the reservation, if that's possible. It's uniquely possible in Oregon. I realize it's not possible in other places.

CHAIRMAN FLEMMING. Mr. Hawkins, do you want to add anything? I think you covered it very well.

MR. HAWKINS. No. I think it's simply a matter of efforts and emphasis. It's enormously difficult and tiring personally for me to get around to every one of the Indian nations within my district. I try very hard. Some of them are very remote. To visit the Havasupai, for example, you have to backpack into the Grand Canyon, unless you can afford to pay for a helicopter. But I think it's critically important that we as U.S. attorneys maintain close relationships with the leadership, and we have certainly striven to do so.

CHAIRMAN FLEMMING. I was very much impressed in the way in which you involved the leadership in connection with the development of your guidelines.

COMMISSIONER RUIZ. In order to clear up the record with relation to some of the testimony given by the prior panel, I would like to ask Mr. Hawkins a hypothetical question that's brief.

MR. HAWKINS. I'm not sure I'm an expert.

[General laughter.]

COMMISSIONER RUIZ. Assume that the crime of smuggling marijuana takes place in Window Rock at 6 p.m. on Saturday night, and assume that the same crime takes place in Phoenix at 6 p.m. on a Saturday night, and the same crime takes place in a remote Indian village at 6 p.m. on Saturday night, and the facts are more or less similar. What difference would there be in time lapse from the time of arrest and the issuance of an arrest warrant by your office, given this experience that you've had in the field?



MR. HAWKINS. I would think that there would be very little difference with one understanding. One problem that we had in Arizona, and I think it's a problem elsewhere, is getting the United States Drug Enforcement Administration interested in enforcing the Nation's narcotic laws within the boundaries of Indian nations. And that's been a general problem, and it's a general problem whether that reservation is the Salt River, which is 25 miles from Phoenix, or the Navajo.

COMMISSIONER RUIZ. But that would be the same across the board even though in Phoenix, then, I assume?

MR. HAWKINS. That's correct.

COMMISSIONER RUIZ. Now, let's change the crime to rape.

MR. HAWKINS. The response time would probably be a little bit broader. It would probably be about 24 hours longer for a couple of reasons, all related to physical remoteness. We'd want to get that victim immediately to an Indian Health Service hospital that had adequate supply of the Johnson rape kits. We would want to involve Navajo police officers to ensure that there was adequate translation, and that we knew a good deal about the background of the offense.

There would be the requirement of an appearance, if there were an arrest made on our authorization, before a part-time U.S. magistrate depending on where on the reservation that occurred. That appearance would either take place in Gallup, New Mexico, or Flagstaff, Arizona.

The whole process would, if it occurred on a Saturday night, as you suggested, for that particular crime—that's probably a good example of the time when it occurs—we would probably have that case in our office on Tuesday morning. The defendant would be in custody if one were identified.

The real problem that we have in terms of—in my judgment, in terms of the appearance of the speed and response time of justice within an Indian community is unrelated to the nature, quality, or experience of the people doing the investigation or prosecuting. It's the Bail Reform Act, the fact that these people appear before magistrates and they are instantly put back out on the streets, and the people in the Indian community see people that they know have committed crimes, but they're out on some reduced bond, or they're out on their own recognizance.

And it's a problem of applying the standards of the Bail Reform Act, which was based on the urban experience, I take it, in New York and Washington, D.C., to a community of that type of law enforcement situation may exist within the Indian nation. They don't understand it. Quite frankly, I don't either, and I believe the Bail Reform Act requires substantial modifications.

COMMISSIONER RUIZ. There in reality is not any, in your opinion, undue delay then, given the facts of the case, of course.

MR. HAWKINS. There is delay—

COMMISSIONER RUIZ. I tried to state all the facts were the same in every instance, and it's a question of getting supportive service in there

by reason of the lack of proximity, but that is not an undue delay as far as you're physically able to move around.

MR. HAWKINS. Given the geographic limitations, I do not believe there is an unwarranted response time in the delivery of Federal law enforcement services in serious major crimes. There may be in other areas.

COMMISSIONER RUIZ. Now, that last question, maybe you shouldn't have said it that way because that always requires that I ask another question. What are those "maybe other areas?"

MR. HAWKINS. Well, misdemeanor offenses involving nontribal members and non-Indians. Keep in mind that *Oliphant* also prohibits the exercise of tribal jurisdiction over nonmembers. So an Apache living within the confines of a Navajo Reservation committing an offense cannot be prosecuted under the Navajo tribal code under *Oliphant* as I understand and read it. But it's primarily misdemeanor, peace and good order of the community type of offenses in which there is some delay.

COMMISSIONER RUIZ. Well, I think that supplements the prior panel's information.

CHAIRMAN FLEMMING. Before I recognize Commissioner Saltzman, Mr. Alexander?

MR. ALEXANDER. Your view of who *Oliphant* applies to, is that a personal view or is that a departmental position on *Oliphant*?

MR. HAWKINS. I think the language in the opinion says "nonmembers."

MR. ALEXANDER. That's your reading of the case?

MR. HAWKINS. I think that's what justice Rehnquist said in his opinion—"nonmembers."

MR. ALEXANDER. Okay, thank you.

CHAIRMAN FLEMMING. Commissioner Saltzman.

COMMISSIONER SALTZMAN. What are the instances other than the major crime area where the United States attorney acts on behalf of the United States in its trust responsibility wherein may lie a conflict of interest between the United States and its interpretation under, let's say, the general welfare of the people and the interest of the Indian community?

MR. HAWKINS. Are you addressing the question to me?

COMMISSIONER SALTZMAN. To all of you.

MR. HAWKINS. There are conflicts, there are unquestionably conflicts. I think they arise more dramatically in the civil area where, as the government's primary litigator and primary attorney, we have a number of client agencies whose interests may be broader than or different than particular ones, and they're not unlike conflicts that, for example, took place between the government authorities and the Tellico Dam controversy, the snail darter case.

The interest of the United States Fish and Wildlife Commission and the individual Indian tribe may be different than the interest of an in-

dividual Indian tribe and the Bureau of Indian Affairs might be different—the interest of the Department of Justice as a whole and the Department of the Interior may be different. There are certainly conflicts. I think they arise with a substantial more preponderance in the civil area than they do in the criminal area.

COMMISSIONER SALTZMAN. Under those circumstances, where is the Indian nation guaranteed some kind of representation on their—on behalf of their interest outside of the competing interests of the United States Government?

MR. HAWKINS. They are represented by counsel privately. If one thing there is in most reservations, it's been my experience in Arizona there's an abundance, perhaps an overabundance of lawyers representing many different points of view. But the tribes are represented.

For example, in the water claims, more often than not those are filed as private suits by the Indian nations by their own counsel. Where appropriate, the United States intervenes to represent its trust responsibility. And I think it's the predominant view that many of those cases will be litigated in State courts with the primary moving force being the individual Indian tribes.

COMMISSIONER SALTZMAN. I was pursuing this yesterday with the Assistant Secretary of the Interior; who determines that the Indian nation or tribe, as the case may be, has the right in a specific instance to go to private counsel? As I understand it, that is the determination of the United States Government.

MR. HAWKINS. I can't answer that question. I would imagine that that sort of policy formulation is made within the Department of the Interior and not within the Department of Justice, except where they would be seeking private counsel where we would have a responsibility to act. So I don't have the facts to answer that question.

COMMISSIONER SALTZMAN. We are obviously, also hearing from BIA and from the United States attorneys two different attitudes, in some two different policy attitudes.

MR. HAWKINS. I'm glad you noticed that, too.

COMMISSIONER SALTZMAN. What might be the process by which some kind of reconciliation takes place and communication between these two agencies?

MR. HAWKINS. Well, I'm not sure that we need to have a Camp David conference to resolve differences between the BIA and ourselves. We try to be professional about it even though we have disagreements to relate to each other.

My own view is that eventually these problems will, with regard to overlap of service, will only be solved by the application and strict enforcement of guidelines, and in the long run will only be solved by an increasing commitment by the Federal Government to allowing Indian nations more self-determination, more responsibility over the running of their own internal community affairs, increased funding and training for tribal police officers, increased responsibility for them, and in the



long run treating them as communities just as any other communities would be treated with regard to the Federal Government that happen to be in a particular district or State.

And that may mean in the long run that the role of BIA law enforcement will be substantially reduced, if not eliminated. But that's a much broader policy question I have no authority or responsibility to deal with.

COMMISSIONER SALTZMAN. How about the presence of the FBI? You're looking in the future towards a reduction possibly of the BIA presence. Does that also encompass the reduction of the FBI presence?

MR. HAWKINS. I see, from my own point of view, just greater cooperation. If a serious kidnapping or murder that occurs off the Indian reservation and is investigated by county sheriffs or local police officers, sometimes they involve, on a cooperative level, the FBI because of their sophisticated evidence-gathering abilities and access to labs and knowledge of investigating serious crimes of these types.

And I think there will always be a need for that because of the particular responsibility of the Federal Government for major crime enforcement on Indian reservations. But the FBI will continue for a long, long time to have that responsibility and that role. In my view, in the long run that proper role will be in the area of cooperation and intercommunication and assistance where necessary, if not necessarily the singular responsibility for the investigation of major crimes.

CHAIRMAN FLEMMING. Mr. Nunez?

MR. NUNEZ. Just to follow up on that question, would you see in the long run the role of the FBI being—in law enforcement in Indian reservations being similar to their role, the role they perform with State and county and city jurisdictions?

MR. HAWKINS. I'll answer that and pass it down to my brothers from the Northwest. My answer to that is yes.

MR. O'LEARY. Well, my answer would be a qualified yes to that also, although I think under the state of the laws that exist now, particularly in the major crime area, on Indian reservations with the exclusive jurisdiction being the Federal Government, there's a long way to go before we are going to point where the Indian tribal police organizations are going to surpland the FBI as the major investigative body. That's going to take some legislation and an awful lot of professionalization of the Indian police forces, as I see it.

MR. NUNEZ. We're also talking about the Bureau of Indian Affairs law enforcement unit and their professional police force. We've had previous testimony that suggests that perhaps they could usefully perform 90 percent of the responsibilities for law enforcement on Indian reservations rather than the FBI performing what is really the role of a local police force on Indian reservations. We've had those allegations made in previous hearings in this area.

MR. O'LEARY. I'm not privy to what happened in the previous hearings, Commissioner Nunez, but it seems to me the FBI doesn't

perform the duty of the local police force on the Indian reservations. The FBI performs the duty of investigating and helping in the prosecution of major crimes on Indian reservations.

And without stepping on too many feet, I hope—I don't know about the BIA being a professional law enforcement body. There are special officers in other parts of the United States, but they are not in Montana, and they don't come anywhere close to level of the FBI as far as professionalism and investigative capability.

MR. YOUNGMAN. I agree that in Oregon it would be a long time before the BIA and the local police could take jurisdiction over major crime prosecutions.

MR. HAWKINS. Only half of our tribes would be responsible, Mr. Nunez—only half the Indian nations in Arizona; in my judgment, the quality and competency of the tribal police exceeds that of the BIA.

CHAIRMAN FLEMMING. We're very appreciative of your coming here and participating in the hearing, giving us the benefit of your insights and experience. Thank you very, very much.

Counsel will call the next witnesses.

MR. ALEXANDER. Thomas Fredericks, John Harmon, and Lawrence Hammon.

[Thomas W. Fredericks, John Harmon, and Lawrence Hammon were sworn.]

**TESTIMONY OF THOMAS W. FREDERICKS, ASSOCIATE SOLICITOR FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR; JOHN M. HARMON, ASSISTANT ATTORNEY GENERAL; AND LAWRENCE HAMMON, DEPUTY ASSISTANT ATTORNEY GENERAL, BOTH OFFICE OF THE LEGAL COUNSEL, DEPARTMENT OF JUSTICE**

MR. ALEXANDER. Starting with Mr. Fredericks, could you state your full name and identify yourself for the record and your position?

MR. FREDERICKS. I'm Thomas W. Fredericks. I'm the Associate Solicitor for Indian Affairs in the Office of the Solicitor, Department of the Interior.

MR. ALEXANDER. Mr. Harmon?

MR. HARMON. I'm John M. Harmon, Assistant Attorney General in charge of the Office of Legal Counsel, Department of Justice.

MR. ALEXANDER. Would you like to introduce your associate, or have him introduce himself?

MR. HARMON. I have with me Mr. Lawrence Hammon, the Deputy Assistant Attorney General in the Office of Legal Counsel, the person most directly involved with this particular issue in our office.

MR. ALEXANDER. Thank you. Mr. Fredericks, following the *Oliphant* decision last year, in your view, what distinct legal problems in law enforcement were presented for the Indian reservations?

MR. FREDERICKS. Well, recognizing that for a number of years it was thought that Indian tribes, Indian tribal nations, and governments had



concurrent jurisdiction with the United States, over the years there was kind of a tribal takeover of the local government role in the law enforcement area on Indian reservations. And with this decision we recognize the need now that the Federal presence would have to be restored. That, of course, meant problems with remote magistrates, remote FBI agents, and it is remote U.S. attorneys in a number of cases.

The problem was one of trying to work out a solution, trying to determine just exactly whether or not there was a void in law enforcement, and to try to prevent this void. So both the Interior Department Solicitor's Office and Justice looked at the area of jurisdiction. We also looked at the area of jurisdiction vis-a-vis the State and Federal Government on these local law enforcement and jurisdictional questions, and we recognized early on that there was one area that *Oliphant* did not decide between—or there was a potential conflict between State jurisdiction and Federal jurisdiction. That was in the area of the victimless crime, the so-called victimless crime area.

MR. ALEXANDER. Could you just give us an example of what would be a victimless crime by a non-Indian that we're talking about?

MR. FREDERICKS. Say the example of the Commissioner, of the smuggling of marijuana where it's really the individual—there is really no identifiable victim. There's also a victimless crime, say, of somebody driving through a community in a reckless driving situation. Although he's only driving recklessly, there's really no victim as such.

However, in our analysis we felt that under the Federal Crimes Act, under 1152, that the underlying policy of the Congress and of the United States was to protect Indian persons and Indian property. So in the victimless area we wanted to delineate or make a distinction between what we determined to be truly victimless, the smuggling of marijuana, versus the reckless driving in an Indian community or an Indian school where there was an identifiable victim, a potential victim. And so in our opinion we dealt with that issue.

MR. ALEXANDER. How soon after the decision did your office deal with that issue or raise that issue?

MR. FREDERICKS. Well, we dealt with it early on in some public statements. The Secretary, I think, of the Interior happened to be in Washington State, of all places, the next day after the decision. So we had to—and he was having a press conference, as I recall, so we had to get him what we felt our interpretation of *Oliphant* and the impacts it would have on enforcement.

So we made a decision early on—just more or less an off-the-cuff decision because we didn't have the time—but we made it with a caveat that we would review it and issue a formal opinion, and of course, the Assistant Secretary issued a public statement early on.

MR. ALEXANDER. Saying that it was a Federal responsibility?

MR. FREDERICKS. Yes, that the *Oliphant*—the big thing that we wanted to put across to the public was it was a determination between



concurrent jurisdiction between the United States and the Indian nations and not a decision between the States and the Federal Government, that now State governments would not have jurisdiction over Indians as a result of *Oliphant*. That was, I think, the key thing that a lot of people, the general public, really were misinformed on what that decision was. So we dealt with that issue in the public statements. But then we did get into the opinion in April, I believe, a couple of months afterwards, and recognizing the prosecutorial discretion of U.S. attorneys, the local government role, that the Federal Government was not really—or the Justice Department was not performing because of, like I said early on, our belief that local tribal governments had jurisdiction over non-Indians.

MR. ALEXANDER. Did you—I'm sorry, go ahead.

MR. FREDERICKS. We felt that we needed to work with Justice and try to get some guidelines in the *U.S. Attorneys' Manuals* and dealt with the Deputy Attorney General, Mr. Civiletti. And in those meetings we got to talking, and it ended up that we were not in agreement with what the law ought to be. So most of our discussions from this point on—we submitted our determination, we submitted a revised draft of the *U.S. Attorneys' Manual* provisions that we felt would alleviate the potential problems. And that's when Justice really dealt with that issue from that point on. I'd rather have John—

MR. ALEXANDER. Mr. Harmon, would you briefly tell us what the responsibilities of your office are?

MR. HARMON. The Office of Legal Counsel has the responsibility of assisting the Attorney General in his statutory role as legal advisor to the President and the members of the cabinet. Our function is to render legal advice.

MR. ALEXANDER. As Mr. Fredericks described the process, his office prepared a legal opinion, presented it to Mr. Civiletti for perhaps inclusion into the *U.S. Attorneys' Manual*. When did your office become involved in this process as to what was the jurisdictional result after *Oliphant*?

MR. HARMON. One of the questions posed to us at that time by Mr. Civiletti after the discussions with the Department of Interior—the legal question, that is—and I think Mr. Fredericks has correctly described the question that remains.

There is a facial reading of *Oliphant* that is clear, and the Department of Interior did a good job of disquieting public concern and definite concern among the Indian people.

MR. ALEXANDER. Did, by the way, the Department of Justice issue any statements immediately after *Oliphant* or in a month or so after *Oliphant*, as to what the United States, the Department of Justice, viewed its role and responsibility to be?

MR. HARMON. I'm not aware of any public statements issued at that time. Of course, a discussion was held within the Department among the various U.S. attorneys, a sample of which you had before you immediately preceding us.

But the question being raised, a discussion on a formal basis of what are the repercussions of *Oliphant*, and particularly this question of what—now we have a new situation for law enforcement on the reservation; what is the extent of Federal jurisdiction, and on the other hand, what is the extent of State jurisdiction with respect to offenses committed by non-Indians on the reservations?

So these questions—this group of questions was posed to us—I don't have the exact date, but roughly at the same time, I suppose, April, at the end of April, when those questions were brought to us we considered those questions. We were prepared to advise preliminarily on those questions at that time.

In the summer a request was made by the representatives of—several representatives of—and I will use the term loosely—the Indian community for an opportunity to have input in this process. That is to brief questions, to present their views to the Department of Justice.

We agreed, wanted, and solicited those views. Those views were solicited, I think it was at the end of the summer, and the Attorney General agreed to withhold an opinion, a formal opinion, until those views were received.

MR. ALEXANDER. This Commission received testimony in July of this past year from the U.S. attorney in South Dakota, who announced at our hearing that he had been advised by the Department of Justice, by Mr. Civiletti's office, that it was the position of the Department of Justice that the States had jurisdiction over these so-called victimless crimes exclusively. Did that emanate from your office in the early part of the summer? Was that an initial decision reached by your office?

MR. HARMON. I don't know the facts of the case that you're describing to me, the U.S. attorney and the chain—

MR. ALEXANDER. Well, did your—

MR. HARMON. I do not claim responsibility or deny responsibility for that—

MR. ALEXANDER. Did your office at an earlier point before the Indian community requested input into the decisionmaking process come to a decision concerning this issue of jurisdiction over non-Indians?

MR. HARMON. Yes, of course, in the normal procedure there within the Department in terms of legal questions that are being considered, it is an ongoing process enforcing criminal law on the Indian reservations as elsewhere.

And while this question was under consideration, of course the initial determination of what it looks like at this particular point in time, what is the general guidance there? The general guidance at that time, early in the summer, in July, the general guidance that, yes, there is a body of—there is an area of exclusive State jurisdiction.

MR. ALEXANDER. Would it be accurate to say that your initial determination disagreed with Mr. Fredericks' initial determination, at least in the early part of the summer?

MR. HARMON. Disagreement on?

MR. ALEXANDER. Jurisdiction with respect to non-Indians, with respect to the so-called victimless crimes?

MR. HARMON. As Mr. Fredericks has stated his position here, I was just ready to agree with his statement of the law that in truly victimless crime that there is an area of exclusive State jurisdiction.

MR. ALEXANDER. There is an area—

MR. HARMON. And if I may go further, I also agree with this formulation of the position advanced by the Department of Interior, advanced by and argued before us that there is in fact an area of so-called victimless crime that in fact does involve specific, particularized, identifiable victims and in that area the argument against State jurisdiction, I think exclusive State jurisdiction stops, and that, in fact, there is a basis for assertion of Federal jurisdiction.

MR. ALEXANDER. I guess the point that I was trying to get at is that what we are both afraid of is—the so-called victimless crime—is that the initial determination by the Department of Justice in the early part of the summer also added this so-called victimless crime within exclusive State jurisdiction, at least as it was presented to us by a U.S. attorney under oath at these hearings.

MR. HARMON. Perhaps I misunderstood the question. You're saying that the U.S. attorney said something, represented to you, that the position of the Department was different from the decision that I have described?

MR. ALEXANDER. Yes. That is correct. As the position of the Department was determined in the early part of the summer—

MR. HARMON. Let me just say this, I think it is important, and you're saying that Justice's original position in the victimless crimes area where they looked at victimless crimes and reviewed it, and thought that—never made the distinction between potential victims and truly victimless. I think after our discussions, after talking with the Indian community, they were convinced that there was this distinction between truly victimless and a potential victim.

MR. ALEXANDER. Yes, I understand that, but we are sort of truncating the process. As I understand it, there was a draft opinion in July which did not draw this distinction. Is that correct?

MR. HARMON. I would let Mr. Hammon—Mr. Hammon is familiar with the specific case that you're talking about with the U.S. attorney. That is correct. But we had, as a matter of fact, the general proposition that a victimless crime was within exclusive jurisdiction of the State government at that time, the State courts, that was the position.

Again, that position has not changed. The position, again, that Mr. Fredericks—

MR. ALEXANDER. But that's the substance of the position.

MR. HARMON. That's right. The second question as you say, it's a truncating process of whether there was a distinction between something that we will identify as truly victimless crimes and another area of crimes, another group of crimes, that under the particular facts



of the case where there can be and is an identifiable, particularized victim of the crime, Indian victim of a crime, then that is a distinction; that is right. It was not drawn in July.

MR. ALEXANDER. What I am interested in, actually, is in reaching your draft decision or opinion in July of 1978, as your normal process would be, whom did you consult with? Whom did the Office of Legal Counsel consult with as of July? Other branches of the Department of Justice? And parties outside of the Department of Justice? We are in July 3 months after the *Oliphant* decision.

MR. HARMON. True.

MR. ALEXANDER. Okay.

MR. HAMMON. It may help if I give you a little bit more of a complete chronology of what had actually gone on in this period of time. Mr. Fredericks said the Department of Interior Solicitor's Office did render an opinion. I believe it was in early April of last year. Mr. Civiletti, as Mr. Harmon said, asked the Office of Legal Counsel for our views on the strict legal question.

At that time he posed the question to the Office of Legal Counsel, he made it clear, as had the Department of Interior, that in addition to the legal question there were obviously many important policy questions, prosecutorial discretion, enforcement resources, a number of other questions.

He asked us at that time only for a response to what we envisioned as the reasonably narrow legal question. In fact, the Office of Legal Counsel did respond in June of last year in a short legal opinion of about, I think, seven or eight pages.

MR. ALEXANDER. Let's just take the short legal opinion that you perceived as being an exclusively legal issue. When you drafted that opinion, was that done solely within your Office, or did you touch base, for example, with the other branches of the Department that presumably had some Indian law expertise, such as Land and Natural Resources, Indian Rights Section of the Civil Rights Division, perhaps the Solicitor's Office, or was that done within the Office of Legal Counsel exclusively?

MR. HAMMON. I'm not sure I can answer unequivocally, but my recollection is, and I know for certain that there were consultations, conversations with the Indian section in the Lands Division and with the Criminal Division of the Department of Justice.

I am reasonably confident that there was not consultation with the Solicitor General's Office. I believe there was with the Civil Rights Division, Indian Rights Section. I'm not sure about the latter.

MR. ALEXANDER. Yesterday morning there was testimony from the Native American Rights Fund and the American Indian Law Center which said their most significant problem with respect to the Department of Justice at the current time was that there was not access into the decisionmaking process until after a decision was made. So I guess the question was: did you at the original point of coming to this deter-

mination seek Indian input either through the tribes themselves, the Indian legal organizations, or what have you?

MR. HARMON. The direct answer to that I think is no. And if I could follow up, our process at that point and the consultation process, again on an informal basis with various elements within the Department and later consultation with the Solicitor General Office as the problem developed. At that point we had before us the legal opinion, the prepared brief memorandum from the Department of Interior.

The Department of Interior, again, representing to us as is their statutory obligation the Indian interest on this particular questions.

MR. ALEXANDER. As perceived by the trustee?

MR. HARMON. As perceived by the trustee. That's right. We can go into that and I'm sure there will be a different question at a different time. That's right that the obligation's there. It was an operation, a question within the government, within the executive branch of the government, a question raised by the Department of the Interior, and that question involved, of course, the Department of Justice and its enforcement responsibility, and a question of law with many policy implications clearly recognized and clearly distinguished from the question of law which we were addressing.

MR. ALEXANDER. How did it occur that Indian input eventually did occur in your process? How did that come about, Mr. Hammon or Mr. Harmon?

MR. HAMMON. Mr. Alexander, in the summer after our legal opinion had gone back to Mr. Civiletti, the Department of Interior asked Mr. Civiletti to ask the Office of Legal Counsel to consider the matter further. Our own Solicitor General's Office asked us to consider the matter further, and we agreed at Mr. Civiletti's request to do so. That is, to do an expanded and more detailed legal opinion.

While that opinion was under consideration, I was invited—or the Department was invited to send a representative to the annual convention of the National Congress of American Indians held in Rapid City in September. During that convention I met with the members of the litigation committee of the National Congress. As a result of that meeting, a resolution was passed on the floor formally asking for the Department to receive directly, rather than through the Department of Interior, to receive directly the views on the legal questions and on whatever practical consequences would flow from the Indian community.

In response to that resolution, Judge Bell, Attorney General Bell sent a letter saying, yes, he would agree to receive additional input. Is that responsive?

MR. ALEXANDER. Yes. What affect did that additional input have? You mentioned that NCAI perhaps becoming aware of the practical implication of some of these issues in your process of coming to an opinion. Either gentleman.

MR. HAMMON. In fact, at the time that we requested the views of the Indian community, or their lawyers in this case, it was hoped and anticipated that the views would be forthcoming very shortly. Indeed, there had been talk about receiving a brief or memorandum within 2 weeks.

It turned out for a variety of reasons that a brief or memorandum was not forthcoming for quite some time, indeed for several months. We, on several occasions within Mr. Civiletti's agreement, agreed to postpone the issuance of our legal opinion farther and farther so that there will still be an opportunity for the receipt of those views. Eventually, however, as happens, the United States was sued, as you know, in the—

MR. ALEXANDER. *Mescalero*.

MR. HAMMON. —*Mescalero Apache* case. As a result of filing that lawsuit, the Department of Justice and Secretary of Interior no longer had the luxury to wait for as full a process as we would otherwise have desired.

We contacted Mr. John Echohawk, who is the chairman of the litigation committee, and told him that his views would need to be received immediately. They in fact did, within a week or two after we made that request, submit to us a brief. The brief was a 20—I think a 19- or 20-page document. It was very helpful. The views expressed there were, at least in a couple of respects, helpful to us in modifying or clarifying the views that are now expressed in the opinion which we are preparing to deliver to Mr. Civiletti.

MR. ALEXANDER. And you have filed a brief? The Department has filed a brief in the *Mescalero* case; is that correct?

MR. HAMMON. Yes, it was filed on Thursday or Friday of last week.

MR. ALEXANDER. And that brief reflects the revised thinking of the Office of Legal Counsel through this input process? Would that be accurate?

MR. HAMMON. It does.

MR. ALEXANDER. Although not prepared by you?

MR. HAMMON. It's not quite as complete and as full a statement as our legal opinion. And of course, it's more specifically addressed to the facts of the *Mescalero* case. But the basic theme of all of our legal views is expressed in that brief.

MR. ALEXANDER. Moving off of the so-called victimless crimes for a moment, presumably there are several issues currently before the Department involving Indian questions, and there will be others in the years to come, presumably. For example, whether or not BIA officers or tribal officers are Federal officers for the Federal Torts Claims Act, such things as that.

Have you institutionalized, in any sense, the ultimate process that you followed in terms of victimless crimes, in terms of consultation with Indians, withholding a final decision until that whole input process—and you're sort of back to making your own decision exclusively?



MR. HARMON. Well, let me clarify your question there, back to making our own decision. Our decision, of course, will be our own.

MR. ALEXANDER. For sure.

MR. HARMON. That's right.

MR. ALEXANDER. The key word was exclusive.

MR. HARMON. The question is where input, the opportunity to seek input from a private group, people outside of the government, that's often the case, but it has to be done on an ad hoc basis, in the sense that out of the number of opinions—there were 120 opinions, I think, considered by our office last month. Among those 120 opinions, I suppose three examples involved questions that directly impacted on outside groups, interest groups outside the Department, interest groups with views, some well-known, some that were solicited, ideas that had to come to our office to help us make a considered decision to reach a considered opinion on the issues presented in the future as well as in the past.

Yes, I think a lesson has been learned in the sense that there is, and there always is, value in consultation. There's always value in additional views, separate views, different point of view, different perspective.

The question is always a question of time; do we have the time to afford ourselves, as Mr. Hammon put it, the luxury of 6 months, 9 months, 12 months of consideration of a legal issue, or must a decision be reached more immediately?

Our lesson, I think, from this is that where that time can be afforded we will certainly seek those views. However, there's also as time passes, as Mr. Harmon points out—the United States in a posture of waiting to seek the views of the Indian community is sued by a member of the Indian community on exactly the issue that we are waiting for views on. That's certainly within their rights, and that's a situation we're caught with—the position coming later. But that's the risk we take anytime we do wait and open the process and wait for a period before deciding legal questions before us.

MR. ALEXANDER. You mentioned 120 opinions that your office worked on last year. Assuming that was a wide range of subjects, do you view your responsibilities—

MR. HARMON. I said last month.

MR. ALEXANDER. Last month. Do you view your responsibilities within Indian Affairs to be any different than your responsibilities in these various other subject matters that you worked on?

MR. HARMON. Our responsibilities in all subject matters are defined by law. The responsibility toward the Indian community as defined by law is in fact a special responsibility, the uniqueness of which we recognize, of course, in the Department of Justice. It's recognized in the law.

There are various and sundry interests within our great Nation that are singled out by statute for particular, specialized, special treatment,

and it's our obligation under the law to accord those special interests that special treatment as provided by law, and to resolve the conflicts among the several interests that are presented, which is quite often the case.

MR. ALEXANDER. When you are doing your legal work in this special area, do you utilize any of the various rules of construction that the Supreme Court has enunciated in relation to Indian laws, like resolving doubts for the benefit of Indians?

MR. HARMON. Of course. The rules of statutory construction, as all legal opinions, must be based on the law and the Supreme Court precedent in terms of laying down the rules of statutory construction and construing statutes involving the rights of Indians, those rules—I can only answer, of course.

MR. ALEXANDER. With respect to the Department of the Interior's views as a prime agent of the trust, do you treat the views of the Solicitor's Office the same as you would treat the views of the Solicitor's Office of the Department of Labor on a labor issue, or is the Solicitor's Office's views entitled to more deference as the agent, prime agent of the trust?

MR. HARMON. As you're aware, there are different responsibilities placed by statute on various agencies and departments within the government.

MR. ALEXANDER. For sure.

MR. HARMON. We can both think of examples, the Davis-Bacon Act, you mentioned the Department of Labor specifically, the Davis—I could go through the Service Contract Act, the Davis Bacon Act, a number of the other provisions that lodge a special interpretative responsibility within the Department of Labor, within the Secretary of Labor.

MR. ALEXANDER. Okay.

MR. HARMON. In those cases under law we are constrained by the law to in fact pay special deference to the opinion, the decision of the Secretary of Labor in those—under those statutes. By the same token, certain statutes place a special responsibility for interpretation and application of statutes in the Department of Interior. Again, in those cases and under the statutes, it is our obligation under the law to pay that deference accorded by the statute to the Department of Interior.

MR. ALEXANDER. Well, in addition to the specific statutes in relation to the trust responsibility, there's fairly general Supreme Court language that expands on the specific statutes and views the Federal Government's relationship perhaps somewhat more broadly than the language in an individual statute. So, as a general matter, is the Solicitor's Office entitled to a working edge, if you will, on any view that they present to you on a Indian law matter?

MR. HARMON. On Indian law matters because of the special expertise, if only that alone would be enough.

MR. ALEXANDER. No, not on expertise; in terms of responsibility, as an institutional system.

MR. HARMON. Again, if I may finish, in terms of expertise alone they would be accorded the special treatment by this office in terms of the advice and background that they could bring to a question of interpretation of Indian law or the statute affecting Indian rights. Each statute—and I think that this is a fault that we all can engage in, in generalizing about the various questions of representation, the questions of interpretation involving the many, the myriad of statutes and legal relationships between the United States and Indian community, the Indian nations, the Indian tribes.

Each statute must be approached and each problem, each type of problem, must be approached on its own footing.

MR. ALEXANDER. I'll tell you what makes me slightly confused is that I know that we're talking about what the law is and so on, but in this situation with the so-called victimless crimes, we have in fact had a draft opinion by the Solicitor's Office, a June or July draft opinion by your office, and now we will have a third opinion.

So, to speak only in terms of the clarity of the law where we have had in effect three separate opinions, there are relationships between those, makes one view that a reasonable lawyer could have come down two or three different ways, and in that situation one wonders why the Solicitor's Office's viewpoint wasn't initially adopted.

MR. HARMON. I think that you picked a bad case in the sense that, in this particular case, I think you're going to end up with three different parties reaching exactly the same conclusion under the law.

MR. ALEXANDER. Ultimately, but not during the process. Different positions were taken along the line.

MR. HARMON. I beg to differ because I think that the initial is not—and as a matter of fact, not only I think, I'm certain that the initial position is not different, not different from—there's no revision in the sense of a change. Although I hasten to add that if someone shows me to be wrong and comes forward with a legal argument that I have not considered, or facts that were not before me at the time that an opinion was issued, goodness, that opinion will be changed—

MR. ALEXANDER. Sure.

MR. HARMON. —forthwith. Now, that was not the case in this particular instance. The case here was a question that was not answered by our legal opinion. A question of taking that, of refining that opinion.

Yes, this is a general proposition with which the Department of Interior did not differ, a proposition with which a number of other parties did not differ. But their point was you don't go far enough. You haven't considered a separate question, a second question, and that's what we appreciated and we're willing, most willing, to address. And as a matter of fact, a question on which we could agree and did agree.

MR. ALEXANDER. If there is more than one viewpoint that is legally acceptable on an issue, and is legally arguable on a position and the



Department of the Interior adopts a particular view, would your department defer to that view?

MR. HARMON. Again, it depends on the particular case involved.

MR. ALEXANDER. In relation to its responsibilities under the first to represent Indian interests?

MR. HARMON. Our obligation vis-a-vis the Department of Interior is identical to our obligation vis-a-vis the Department of Labor, the Department of EPA, the agency, other agencies within the government that have—that are given special responsibility under specific responsibility to interpret the law.

We also have a responsibility to the United States. That is the reason we do have centralized litigating authority within the Department of Justice. Responsibility is lodged in one central place because there are conflicting, competing interests, competing, as you say, competing points of view, competing legal arguments.

MR. ALEXANDER. Yes.

MR. HARMON. The arguments, the position that the Department of Interior and the interest which the Department of Interior is statutorily charged to represent, to protect, may in fact conflict at a given time with interests that are the responsibility of the Environmental Protection Agency, for example, or the Army Corp of Engineers, for another example.

In those cases where there are competing legal interests, it falls on the Department of Justice to resolve those differences—

MR. ALEXANDER. You act as a judge in that situation?

MR. HARMON. Because that is the constitutional system. We have an executive branch of the government.

MR. ALEXANDER. Yes.

MR. HARMON. The obligation of the President is to administer the executive branch of the government. We all work for the President. Given that responsibility, it is his responsibility to resolve disputes within the executive branch and to, in fact, carry out the law, to take care that the laws be faithfully executed. That's his responsibility.

It's the Attorney General's responsibility to assist the President. The President in the exercise of that constitutional duty and authority has lodged in the Attorney General—not the discretion to act, because he can always be overruled by the President—

MR. ALEXANDER. For sure.

MR. HARMON. —But has decided to exercise—in the exercise of that authority that the proper way to exercise that authority is to rely on the legal judgment on legal questions, the legal judgment of his lawyer, the Attorney General.

MR. ALEXANDER. When I referred to the Department of the Interior, I refer to the prime agent of the trust. I was wondering whether you were making a different distinction when you referred to the Department of Interior, as to whether or not the Department of Justice also has an obligation under the trust.

MR. HARMON. Well, it's not the Department of Justice. Again, I hate to play with words, but here we're talking about the United States. The trustee is not the Department of Interior. The Department of Interior has a very special responsibility as agent under that trust.

MR. ALEXANDER. Sure.

MR. HARMON. But when we are talking the trust responsibility for the Indian lands—let's take that example—that bears—the trustee is the United States. Again, not the Department of Justice. The Department of Justice's role there is to in fact decide or interpret, determine the responsibilities of the trustee, the United States.

That trustee—again, using these terms—that trustee, the United States, as many other trustees walking around, has lots of responsibilities. This United States, this particular trustee, has statutory responsibilities as trustee, also has statutory responsibilities to do all the—carry out all the programs administered by the departments, statutorially mandated for the Department of Defense, Army Corps of Engineers. I use again as an example, the Clean Air Act, or the Civil Rights Act. There are many competing responsibilities here, and sometimes competing interests, strong competing interests.

And there has to be a decision often. Some interest must give and the determination there has to be made—the determination under law, not under policy—that's a different question—but under law a determination of what the scope of that legal responsibility is for the United States, the trustee, who wears the trustee hat and wears many other hats at the same time.

So was I treating them differently? No. The Department of Interior as agent, has primary responsibility for the trust there; yes, it has special treatment. But again, that responsibility, the responsibility of the Department of Justice is to determine, again, where those interests compete with interests, statutory interests and obligations of the Army Corps of Engineers, to sit down, examine the law, and determine which the Congress of the United States in its—

MR. ALEXANDER. Wisdom.

MR. HARMON. —Infinite wisdom or power, authority here has determined should prevail. And that's the hard job.

CHAIRMAN FLEMMING. Commissioner Horn?

VICE CHAIRMAN HORN. Let me pursue, Mr. Chairman, if I might, one brief question along this line. The whole problem seems to occur as we listen to Indian representatives. At what point do they know a decision is to be made with regard to the position the United States will take on a particular issue, and are they involved in the consultation process? And in essence do they know the positions of the other bureaucratic players?

There are two possible suggestions to get at this, and I'd like your reaction as to the workability of either. One I think you're familiar with, which is the proposal in the early '70s of an Indian Trust Council, the theory being that, just as you've described, agencies are in con-

flict; there are competing interests; and yet there seems to be a special trust relationship felt throughout history by court decision and treaty, that the United States of America should represent the Indian interests in many cases. Some would argue, perhaps, all cases based on treaty obligation, and we get into the argument between treaty and later Supreme Court decision on statutes overriding treaties, which some of us find a little hard to take based on our eighth grade, our senior year, and our college study of the Constitution.

Nevertheless, one theory is if we've got that conflict of interest—we all know the Attorney General has worried about that—would it not be wise to have an Indian Trust Council that could always go in and represent the Indians on behalf of the United States, and not have to worry about the resolution of competing legal or political interests within the Department of Justice. That's one approach.

The other possibility is that when you are wrestling with the decision as to how you are going to come down on where the United States, in its majesty, stands within the Department of Justice, would it not be wise to have an open-disclosure administrative process where the competing memoranda are made public as to what the Solicitor of Interior wants, what the Lands Division of Justice wants, what your office wants, what others want in Justice or elsewhere that are involved? Provide the Indian community or communities with opportunities to input into that process, again laying the record out in public.

And then prior to a decision being made by either you, the Deputy Attorney General, or the Attorney General, that record would be available so that a decision then could be made as to, okay, where does the United States stand on the issue? Do we take the case into court and really represent what the Indians want to say on behalf of the United States? Or do we say: sorry, we don't think you're right? We're going to judge ahead of time. We're going to represent what the Army Corps of Engineers wants to say, or the Bureau of Reclamation, or whoever it is.

What do you think of those two competing solutions, and if you don't like them, do you have a third one?

MR. HARMON. Let me take a shot of that. I want Tom to address the whole question of input because that I do want to refer that back to the proper court here because that's—he's our Indian expert, and the responsibility in terms of statutory responsibility, etc., is there.

I don't want to be shifting the focus of those questions. You first proposed for special counsel. That doesn't make a lot of sense to me for this reason. We have, again, the interest of the United States, the United States as the trustee. The Department of Justice is there in court representing the United States in its obligations and carrying out its obligations.

The Indian tribes, as any beneficiary—again, using the trust analogy—any beneficiary has the power which various tribes often and consistently exercise to stand up and be represented by private counsel to



sue the United States for breach of the trust responsibility—for example, for taking action which the Indians determine, the various tribes or particular Indian determines, is not consistent with its statutory obligation.

We sue. We have the power to sue and be sued. And goodness knows we are. So that, in terms of a solution there, in terms of counsel, in terms of special counsel, there are many attorneys in this room and elsewhere representing the Indian community who are counsel, who are retained, who are fine advocates for a position, and in fact, advocate those positions in an adversarial manner in court.

Now for that reason the United States and the interest of the United States as such are represented, again, by the Department of Justice, and to have a competing separate counsel that is there with an obligation to represent the “whatever the Indian point of view is”—that’s often difficult to determine. There’s often a great deal of disagreement among the various tribes as to a particular position.

But that’s not—there has to be responsibility for determining what the position, the legal position to be advocated in court will be. That responsibility by force has to, by force of logic must be lodged somewhere.

The “special counsel” idea to take, to create, a statutory position paid for by the government—I guess that’s one consideration in terms of funding—to advocate the Indian position, and I suppose it would be the corollary of your suggestion that the Department of Justice then would be duty bound to take the contrary position and then, in that case, you indicated they would be free to take the position of the Army Corps of Engineers. I take it a suggestion that they would be duty bound—

VICE CHAIRMAN HORN. Well, are you familiar with the Nixon proposal on a trust council?

MR. HARMON. I am. I am.

VICE CHAIRMAN HORN. What’s your reaction to that specific proposal and how it might work or not work?

MR. HARMON. I think it would be a disservice to the Indian community. I think that it would be a disservice to the courts of the United States where responsibility exists.

A serious question in my mind if I were a judge hearing a case brought before me with the special counsel, special trust counsel, of the Indian community suing the United States, whether I had a case or controversy before me, I would say that under our Constitution it provides that we elect a President to resolve these disputes between members of the executive branch, responsibilities within the executive branch; why is this controversy in court?

And then with all the implications—and I’m not being facetious—all the implications of a court hearing into dispute resolution within the executive branch—

VICE CHAIRMAN HORN. Okay. A lot of Indian leaders would agree with your position and would not support the proposal. Their argument would be the United States of America, as represented by the Department of Justice, should be defending these rights.

But we still get down to the problem, as you suggested earlier, there are competing interests often, competing rights, and it gets to cases as to what perhaps the more priority, the greater priority of these competing rights, and that's where the difference of the opinion is.

So what about the other option to open up the administrative process within Justice, assure that people know choices have to be made? The Indian community as represented by either their tribal counsel or retained lawyers could file appropriate briefs and be, prior to the Attorney General, making a decision as to where is Justice going to land.

MR. HARMON. Well, I think the suggestion has merit in terms of situations where in fact a major decision can and is to be taken in an area that in fact can wait for a decision.

The question of whether—all the questions, and many of the questions that come before this Commission involve situations that require instant decision. Many instant decisions, many decisions, whether that hostage situation; whether the FBI will be brought in; what action the FBI will take, for example; what action law enforcement officers will take, and all the other questions that you've discussed; whether a particular prosecution should be brought; the basic questions of the criminal law system—

VICE CHAIRMAN HORN. I'm really not thinking of those. I'm thinking beyond that to the questions of treaty rights, etc. Those are the ones I'm really concerned about the whole problem of the conflict of interest and the point the Attorney General made of his worry about should Justice be the judge or should judges be the judge.

As you correctly point out, the political facts of life are that the administrative process does make judgments daily in their overlapping relationships and not a strict separation of powers, as we know, in our society.

MR. HARMON. The way the system should work, and the way I hope it will work on the kinds—and I appreciate the distinction you are making, because I would make the same distinction between the different decisions that are faced in the Department of Justice as well as the Department of Interior—is that Justice should turn to the Department of Interior and does on a regular basis.

We're not perfect, and sometimes we miss. But I hope that history at least for 2 years here will bear us out that we have consulted and should consult with the people closest to and, indeed, responsible for representing the interests of the Indians in a particular situation and under a particular treaty or statute, and that the Department of Interior under that consultation—between the Department of Justice and the Department of Interior that a determination will be made of what



are the views, what are the arguments that can be made and who should be consulted in this process.

VICE CHAIRMAN HORN. Well, one could say if you're in the Indian community that maybe on a particular issue the Bureau of Indian Affairs does not represent what the Indian community thinks is appropriate and therefore simply government-to-government agency consultation is not sufficient. And because of this unique historic trust responsibility, should not the Indian community have an opportunity to publicly know what's going on prior to decision, have an opportunity for an input, and then, you know, Justice makes the decision.

We all understand that. But at least the conflicting views and perspectives would be known in advance of making the decision. I think that's the point besides the government agencies.

MR. HARMON. Well, we're talking in general terms now—

VICE CHAIRMAN HORN. Yeah, I know it. It's a little difficult.

MR. HARMON. And the question of what kinds of decisions would fit this Administrative Procedures Act, rulemaking model that you're advancing for making decisions, I'm quite frankly at a loss as to what decisions would be made within the Department of Justice that would fit that model, what decisions are made within the Department of Justice that are not questions of law or prosecutorial decisions.

I know that Tom and the Department of Interior is in that business on a regular basis, and perhaps I should more appropriately be asking Tom this question in terms of what kinds of procedures are established to make sure that the Bureau of Indian Affairs is in fact representing the correct Indian view, even if there are conflicting Indian views. I quite frankly don't know.

MR. FREDERICKS. I think in the past it has always been the position of the Department that where there were competing interests within our Department that the Secretary of the Interior on a number of occasions has to resolve conflicts, and that in his process, in his resolving the conflicts, say, between the interests of the Indians and the Bureau of Reclamation, as an example, he has to be reminded and has to take into consideration all of his special responsibilities as the trustee.

And if he should be remiss in his duty as his duties under his fiduciary obligation, the tribes are certainly in this day and age able to call him before the judicial system for a review of his activities. And that has in fact happened in some cases, but it is a process of necessity.

We have to determine what the position of the Department of Interior is going to be in our recommendation to Justice, and in many cases it is difficult to ascertain just exactly what the Indian position should be, say, in a case—and I'll cite you an example.

Say in the *San Juan* water adjudication initiated by the State of New Mexico in State court, where the interests of the Jicarilla Apache are at issue, the Navajo, and the Ute Mountains in Colorado-New Mexico, there the Secretary of the Interior, although he has reclamation interests and Indian interests, is unable to represent the Indian interests



because if we take a totally Indian position, the Indian water in that stream will be—it will be a question of what tribe gets what water.

So we have the Indian position taking all the water, and there's competing interests between the Indians. In that particular situation we said the constitutional limits apply to the Secretary in resolving conflicts, and therefore we must hire outside legal counsel and pay for it by the department to resolve these competing interests and to have each tribe represented.

However, the United States or the Justice Department still represents the interests of the United States as trustee in that case, but does not feel it can represent the full interest of each particular tribe.

VICE CHAIRMAN HORN. Thank you.

CHAIRMAN FLEMMING. Commissioner Freeman?

COMMISSIONER FREEMAN. I have no questions.

CHAIRMAN FLEMMING. Commissioner Ruiz?

COMMISSIONER RUIZ. Let's get this relationship. Mr. Harmon has said that the Department of Justice predicates its action on strictly legal principles. We've been talking about beneficiary, we've been talking about trustee, we've been talking—I don't think the word trustor has been mentioned here, but let's get the legal relationship. Who is the trustor? There has to be a trustor to begin with.

MR. HARMON. Well, the beneficiary of the trust?

COMMISSIONER RUIZ. No—yeah, let's—we've got a beneficiary and mention has been made of trustee. Now, who's the trustor?

[No response.]

COMMISSIONER RUIZ. We've been talking about strictly legal principles, now, now we're getting back to it.

MR. HARMON. I understand. Congress would be the trustor in the sense that Congress determines the statutory—the limits of the trust, the terms and conditions of the trust, and those terms and conditions are subject to change by the Congress. So we have a living trustor, if we're following that analogy, who could in fact change the rules of the game.

COMMISSIONER RUIZ. Pursuant to the congressional action, the trustee must adhere to the instructions of the trustor?

MR. HARMON. The instructions, as in any statute—

COMMISSIONER RUIZ. Yes.

MR. HARMON. We are bound by the terms of the statute.

COMMISSIONER RUIZ. So, if there is a statute that protects the Indian, it's the absolute duty of the trustee, which is the Department of Justice, to protect the beneficiary; is that correct?

MR. HARMON. To make the determination, again—this trustor, if we're following this analogy again, this trustor acts in many and several ways. This trustor passes one statute creating a responsibility, then at a later time may modify that responsibility in connection—may in fact instruct the United States, the trustee—not the Department of Justice, but the United States, the trustee—to build a dam—

COMMISSIONER RUIZ. Wait a minute. We're making a change here. A little while ago I heard that the trustee was the Department of Justice.

MR. HARMON. Oh, no, no. The trustee is the United States. Excuse me. You misunderstood, or if I misstated, that it is the United States, not the Department of Justice.

COMMISSIONER RUIZ. Then in this trustor-trustee-beneficiary setup, the Department of Justice isn't in the picture whatsoever, as I understand it.

MR. HARMON. We're the lawyers for the trustee.

COMMISSIONER RUIZ. You're the lawyers for the trustee.

MR. HARMON. Lots of banks would have lawyers—

COMMISSIONER RUIZ. You're the lawyers for the trustee, then.

MR. HARMON. Correct.

COMMISSIONER RUIZ. And therefore your position coincides with that of the trustee.

MR. HARMON. That's right.

COMMISSIONER RUIZ. And if the trustee has given—being given instructions by the trustor, then it is your duty to follow those instructions and advise your client, the United States, to protect the beneficiary?

MR. HARMON. That's correct.

COMMISSIONER RUIZ. That's correct.

MR. HARMON. To the extent of those instructions.

COMMISSIONER RUIZ. To the extent of those instructions.

MR. HARMON. Right.

COMMISSIONER RUIZ. And the laws. Now, you went further and said—but I'm beginning to get a lot of static in this situation because first I get one instruction from Congress, then I get another instruction from Congress. Then the laws are modified, and then—proceed from there.

MR. HARMON. Well, that the trustee in fact has—it is an imperfect analogy, as you are pointing out quite well. The trustor, the Congress, is in fact empowered—has the power, the authority, to fix the terms of this relationship and its responsibility, the responsibility of the United States, the trustee.

COMMISSIONER RUIZ. And it has thus done so, so far.

MR. HARMON. It has done so, but it varies that. It can in fact by giving one responsibility and defining it in a statute, can come along at a different time with another statute and modify that responsibility.

COMMISSIONER RUIZ. Is your testimony the following, then? That you as counsel for the trustee, the United States of America, don't know what to do because of various and sundry matters that have occurred with respect to instructions with relation to the trust relationship protecting the beneficiary because there's confusion?

MR. HARMON. No. No. My testimony is that it is our unpleasant and difficult task to determine exactly what those instructions are from the

trustor, from the various and sundry statutes, trust instruments, that are being enacted by the Congress on a daily basis.

COMMISSIONER RUIZ. Are these confusing?

MR. HARMON. Well, as all statutes are confusing, yes. But there must be a determination. There always is a determination of which statute controls.

COMMISSIONER RUIZ. And if a statute can be interpreted in two directions, is it not the duty of the trustee to favor the interpretation—if it can be interpreted in two different ways and is a reasonable interpretation—is it not the duty of the counsel for the trustee and the trustee to adopt that interpretation that will benefit the beneficiary?

MR. HARMON. Well, no, your duty is to honor the—his duty, again following your analogy—and I want to turn it on you here—his duty is to honor the terms and conditions of the trust instrument. That is the directions of the trustor. His duty is to follow precisely, and the beneficiary may sue him. And often we have minor beneficiaries and other beneficiaries who in fact may assert different interests that may be in fact—they may determine that those interests are not being protected by this trust relationship.

COMMISSIONER RUIZ. Isn't it the duty of the trustee to interpret that instrument?

MR. HARMON. Oh, yes.

COMMISSIONER RUIZ. All right, let's get back to the first question of the interpretation. You have an instrument before you where it is logical to interpret it in two different ways. It's just as logical to interpret it against the beneficiary as it is logical to interpret it in favor of the beneficiary. Now, as an attorney, you know that that is true.

MR. HARMON. But I will say that I've never had a case where it's just as logical one way as the other.

COMMISSIONER RUIZ. Well—

MR. HARMON. It is always the case, often the case, where there is a good—a good argument can be made of this position as opposed to that.

COMMISSIONER RUIZ. Now, there is a jury instruction used in every State of the Union, including Washington, D.C., wherein in interpreting facts, the jury instruction says, in criminal actions that if it can be interpreted equally in the favor of guilt or equally in the favor of innocence that the jury is charged absolutely to adopt the interpretation in favor of innocence. Are you acquainted with that instruction?

MR. HARMON. Yes, sir.

COMMISSIONER RUIZ. All right, now we're getting back to this trust instrument. Now you know what I'm talking about—two equal things.

MR. HARMON. I understand.

COMMISSIONER RUIZ. Is it not your duty, or that is to say the duty of the trustee, the United States of America, to interpret that instrument in favor of the beneficiary?



MR. HARMON. The trust instrument—I'll say no and try to explain why. The duty is to interpret the trust instrument there and determine—the real case will be where there are the competing interests. Let's suppose it's not the Army Corps of Engineers. Let's suppose it's the Civil Rights Act. And let's suppose there's a conflict between—or, let's make it better still, the Clean Air and Clean Water Act, where there are specific instructions laid down as to how the trustee is to conduct himself, and the interpretation of whether, in fact—the point is that an interpretation, if you are to—the interest of the Indians, the interest of the beneficiary that in fact conflict with the direct determination by the Congress. And if that determination is made, in fact, the interest as perceived by the Indians would have to give in that point.

COMMISSIONER RUIZ. No more questions.

CHAIRMAN FLEMMING. Commissioner Saltzman?

COMMISSIONER SALTZMAN. No.

CHAIRMAN FLEMMING. Mr. Alexander has one question. Mr. Alexander?

MR. ALEXANDER. As you've phrased it, it seems that the Department of Justice's view is that it has to present a single position, either to the President in terms of advice, or to the court in terms of litigation. Is it not possible in some of these situations where the President is the decisionmaker and you are serving as legal counsel to present the President with options, including the option of—favored by your beneficiary, or in relation to the court systems to provide split briefs?

MR. HARMON. No, our obligation to the court is to present the position of the United States. Our obligation to the President on questions of policy, and of course on questions of policy he has any number of options, and our obligation there is to tell him the limits within which he—the legal limits within which he can act. And I'll go back to the former question in terms of—I see that I left the Commissioner very disappointed with my answer—there are—

COMMISSIONER RUIZ. I was very happy with your answer. You didn't disappoint me at all.

MR. HARMON. All right. Well, I didn't mean to disgust or disappoint, either one.

MR. ALEXANDER. There's a distinction between the two.

MR. HARMON. The question there is when the President asks for—the distinction being the policy decision of the President, the President may have before him, yes, there are many options, and our obligation is to give him to the best of our ability the legal limits within which he may act. His question to us on a legal matter is not to give him options. You could decide A or you could decide B. That's not the question. And the question that comes to us is either can you do it or can't you. And they're always close questions when it comes to us.

MR. ALEXANDER. It's also close as to what is law and what is policy in a number of these issues.

MR. HARMON. Well, we try to be very careful to distinguish between the two. And I agree sometimes it's very close.

MR. ALEXANDER. The split brief policy was utilized earlier in this decade. That is not a policy being followed by the Department of Justice today, is it?

MR. HARMON. You are absolutely correct that it is not.

MR. ALEXANDER. That is because—what is the rationale?

MR. HARMON. Because this Attorney General in a recent judgment in which I wholeheartedly concur that it is the obligation of the Department of Justice to the courts to present the position of the United States to the courts.

MR. ALEXANDER. So in effect the Department of Justice makes a judgment, acts as a judge prior to the court's acting as a judge.

MR. HARMON. No, no. Oh, no. The Department of Justice of the United States would never, never pretend to purport to stand in place of the judge. Because you have a case before the court; there will be a legal decision; and it is always and never challenged to be the province of the court to decide against the United States, as it often does. No, we do not purport to tell the judge how the case will be decided. We do try to tell them how it should be decided.

MR. ALEXANDER. Thank you.

CHAIRMAN FLEMMING. Thank you very, very much. We appreciate your testimony. Thank you.

The hearing will be in recess for 1 hour.

### Afternoon Session, Tuesday, March 20, 1979

CHAIRMAN FLEMMING. The hearing will come to order. Counsel will call the next witnesses.

MR. ALEXANDER. Mr. James Moorman, Mr. Leo Krulitz.

[James Moorman and Leo Krulitz were sworn.]

#### TESTIMONY OF JAMES MOORMAN, ASSISTANT ATTORNEY GENERAL FOR LAND AND NATURAL RESOURCES, U.S. DEPARTMENT OF JUSTICE, AND LEO KRULITZ, SOLICITOR, U.S. DEPARTMENT OF THE INTERIOR

MR. ALEXANDER. Starting with Mr. Moorman, could you give your full name and briefly describe your position for the record?

MR. MOORMAN. My name is James Watt Moorman; Watt spelled W-a-t-t. And I'm Assistant Attorney General for Land and Natural Resources Division of the Department of Justice. The Division has jurisdiction over litigation of the United States involving public lands, environmental matters, Indian matters, things of that nature.

MR. ALEXANDER. Thank you. Mr. Krulitz?

MR. KRULITZ. Yes. I'm Leo M. Krulitz, and I am the Solicitor of the Department of the Interior, which is the principal legal officer of the Department.

MR. ALEXANDER. Mr. Krulitz, within your office is the Associate Solicitor for Indian Affairs and a number of other associates responsible for other subject matters within the purview of the Department. When, in a policy or legal context, the parties representing Indian affairs within the Department disagree, for example, with the Park Service or the Wildlife Service, do you become the first point of resolution between the competing interests within the Department of the Interior?

MR. KRULITZ. I'm not sure I'm the first. I'd like to think I'm almost the last.

MR. ALEXANDER. Okay.

MR. KRULITZ. My office, the Solicitor's Office, like the Department, is divided into five separate divisions, each one headed by an Associate Solicitor in Washington. In the field I have eight Regional Solicitors and some 21 Field Solicitors, a total of 240 lawyers.

The—when there are conflicts, as there are inevitably when a Department is administering diverse programs, the initial resolution of those conflicts is attempted at the staff level, staff attorney to staff attorney, program individual to program individual.

If it's not resolved at that level, it ultimately makes its way to the two Associate Solicitors who may be involved, and they attempt to resolve it between themselves.

MR. ALEXANDER. Failing that?

MR. KRULITZ. Failing that then it comes to me, if it's a legal matter, for resolution and, of course, on the program side it would then go to the Secretary for resolution, for policy matters.

MR. ALEXANDER. When you are resolving things that involve at least one part of the controversy that involves an Indian issue, do you act in any way, shape, or form under the Interior Department's trustee responsibility?

MR. KRULITZ. Absolutely. The Department, like the rest, in fact, of the Federal Government, does have a trust responsibility to the Native Americans, Indians, and Native Alaskans to some extent, and we in resolving those conflicts are constantly mindful of our special relationship to our Indian beneficiaries.

MR. ALEXANDER. So in that context, if it is a legal matter and there are reasonable arguments presented by the different divisions within your purview, would you be obligated because of the trust relationship to select the Indian point of view when both sides can make a reasonable legal argument for their position?

MR. KRULITZ. Mr. Alexander, it's never as simple as that, I'm afraid. The special relationship to Indian peoples is basically defined and the extent of our special obligations are basically defined both by legislation and to some extent, to some considerable extent, by court decisions in terms of rules of interpretation and that sort of thing.



All of those special considerations are taken into account in resolving the issue. That does not necessarily mean, obviously, in every case the Indians win because they do not. But all of the special factors that are attendant upon the trust responsibility, whether it be matters of principles of interpretation of statutes which basically—or treaties—which basically favor Indians are all taken into account in reaching a final legal conclusion.

MR. ALEXANDER. Yesterday we had testimony from the American Indian Law Center and the Native American Rights Fund, and both of the gentlemen representing those two organizations basically took the point of view that Indians are among the least politically powerful group in this country, and that in order to protect and effectuate Indian rights that Indian advocates, lawyers, institutions such as theirs needed to have access all along the way to the decisionmaking process, at the Associate Solicitor's level, at your level and beyond.

Could you tell me whether or not within the Department of the Interior, within your responsibility, whether the decisionmaking process at all is public and whether these various Indian lawyers, be they tribal lawyers or Indian interest group lawyers, are allowed access to the process of decisionmaking?

MR. KRULITZ. Well, I think that depends. Basically as the legal advisor to the Secretary I start with the premise that the legal work that I do and is done by my staff has the privilege of confidentiality from—that attaches to a lawyer's work.

MR. ALEXANDER. Okay.

MR. KRULITZ. We are the trustee. We are not the beneficiary. I represent the trustee, not the beneficiary.

MR. ALEXANDER. Sure.

MR. KRULITZ. So that we start with that as the basic premise. On the other hand, we are often involved in litigation where the tribes themselves are represented by counsel. Very often we are on the same side; most often we are on the same side of the litigation, and it's in our own best interest to work closely with tribal attorneys on a common litigation strategy, which we do.

But the process in my Department of issuing legal opinions, Solicitor's opinions, or developing a position in litigation is not in essence a public rulemaking of any kind. But to the extent that we can, we do try to work with Indian counsel, work with the Indian leadership. It's very important to us, the position on issues of the beneficiary in these matters, and in my brief 2 years as Solicitor, I've had I can't tell you how many meetings with Indian leaders and their lawyers, and we make an effort to do that.

MR. ALEXANDER. Mr. Moorman, essentially the same set of questions for you as your role as Assistant Attorney General of the United States. You have several divisions under you that periodically could have differences between them as to a particular legal matter; is that correct—Indian trust responsibility being one of them?

MR. MOORMAN. I have different sections under me.

MR. ALEXANDER. I beg your pardon?

MR. MOORMAN. Several different sections. Yes, they could have differing views of the law.

MR. ALEXANDER. With respect to any Indian affairs, do you take a view similar to the one expressed by Mr. Krulitz that you are also in a sense operating under the trust responsibility, and that in determining those internal conflicts that certain standards have to be applied in evaluating the Indian interest as opposed to other interests?

MR. MOORMAN. Not in all contexts. In many contexts I operate outside the Indian trust obligation. For example, I will oftentimes be defending the United States against a claim brought by Indians. In those instances I am not administering a trust responsibility.

MR. ALEXANDER. With excluding the section that deals with defending claims, and the Claims Commission work, say there was a conflict between environmental concern and a particular Indian tribe's economic development of their land.

MR. MOORMAN. Well, oftentimes I defend cases against Indians outside the claims context. For example, it may be an administrative context, in which case I am counsel for the United States in a nontrust responsibility, and in which case I don't administer any trust responsibility at all. An Indian tribe may sue the Secretary of the Interior or the Secretary of Commerce about some environmental matter, and in that case I am not administering the trust responsibility at all.

MR. ALEXANDER. I'd like to move to an area outside of your own internal responsibilities, but to the—several of the major conflict-type situations that exist in which this Commission has had an interest in, particularly the Northwest fisheries dispute and the task force approach.

We took testimony last August from members of the regional team. As I understand it—correct me if I'm wrong, Mr. Moorman—you are the chairman of the Federal Task Force on the Northwest Fisheries?

MR. MOORMAN. So it would appear. The task force was created before I came to the Department, and I inherited it.

MR. ALEXANDER. Mr. Krulitz, you were a member of that task force?

MR. KRULITZ. Yes, I am.

MR. ALEXANDER. How long have you been in your position, Mr. Moorman?

MR. MOORMAN. For 22 months and a few days.

MR. ALEXANDER. "And a few days," a few long days?

MR. MOORMAN. I know that because I was told when I took the job that the average tenure of a subcabinet member was 22 months and I passed that 22-month barrier on March 10.

MR. ALEXANDER. With respect to the regional task force, were they either initially or along the way operating from—under any set of guidelines or instructions from the national task force?

MR. MOORMAN. We had a number of meetings with the regional task force to discuss how they would go about preparing a draft report,

how they would go about discussing with people. We had a number of things. I think that at one time they proposed some guidelines to us which we discussed generally in an informal way. I would have to consult with my staff assistant Kay Oberly to get in focus the exact status. There was something—do you mind if I—

MR. ALEXANDER. Not at all. You can have Ms. Oberly sit there if you wish.

MR. MOORMAN. Ms. Oberly confirms my memory that the task force came up with some guidelines or principles which they floated—

MR. ALEXANDER. The regional team?

MR. MOORMAN. The regional team. And sought our endorsement on. I think essentially what we did in all our meetings was give the regional task force a free hand to do whatever it thought was appropriate. That's my recollection of our general instructions to them.

MR. ALEXANDER. Mr. Krulitz?

MR. KRULITZ. No, I think that's correct. The decision was made at the outset that it made more sense to have people from the respective Departments in the field do the initial work, working with all of the parties that had an interest, and develop a recommendation that could be considered by the national task force.

While there were many meetings through that whole process between the regional team and the national team and good communication, I don't remember ever formalizing any kinds of instructions. They called on us when they needed money occasionally.

MR. ALEXANDER. All three members of the regional team testified in August that in their functioning on the task force, regardless of any other responsibilities they may have had, that none of them perceived themselves as having any trust responsibility with respect to the Indian tribes which the United States had represented in the *U.S. v. Washington*. Would that be accurate also for the members of the national task force, the two of you?

MR. KRULITZ. You want me to try?

MR. MOORMAN. Go ahead.

MR. KRULITZ. The—I am not sure that would be accurate. Let me just—the Congress, as you know, has the right to alter, amend, change, terminate the trust responsibility at any given situation if it chooses to do so. The ultimate product of the task force effort was designed to be legislation. So I think that that is somewhat of a complicating factor.

On the other hand, as we pursued, and as we have pursued this problem, I certainly have felt that I have been certainly mindful of the special relationship that we have and special obligation we have to those tribes. I might say in my mind the trust relationship imposes on the U.S. Government the obligation to consider the long-term best interest of the Indians, not necessarily what's good for them just tomorrow.



I think my view is probably a little different until something changes that obligation. I felt that what we were trying to do is find the long-term solution to a very difficult problem, which in itself will be consistent with our trust responsibilities to the Indians.

MR. ALEXANDER. Mr. Moorman?

MR. MOORMAN. I would endorse that last statement of Mr. Krulitz. And I have always considered what we were trying to do on the task force was to arrive at a compromise settlement which would be accepted by the area, which would be in the long-term best interest of the Indians and of the natural resource which they are dependent on. And it never occurred to me that this was inconsistent in any way and that I was not fulfilling the trust responsibility of the United States in that particular. So I'm a little bit surprised that you received that testimony from the regional task force and I was unaware that they perceived themselves in that light.

MR. ALEXANDER. One of the, perhaps, complications in relation to the regional task force—and I'm curious as to your own views on this—is that essentially the U.S. attorney on some days of the week would be going into court for matters relating to *U.S. v. Washington*, in terms of enforcement proceedings, or at least to staff, and other days of the week would be in effect functioning in a mediation role, and that at minimum is somewhat confusing. Do you care to comment?

MR. MOORMAN. No, because I don't understand the confusion. I'd be glad to comment if you'll clarify it a little bit.

MR. ALEXANDER. Well, confusion as to the extent of when it is that the United States Government, be it at your level or at the regional level, is operating as the attorney for the Indian interests in the continuing litigation of *U.S. v. Washington*, be it phase one implementation or phase two, and when it is operating in a secondary role in relation to some sort of mediation function.

MR. MOORMAN. All right, now, the U.S. attorney would have been representing the United States in *U.S. v. Washington* in enforcement actions which fell out of that. The *U.S. v. Washington* was brought to vindicate a trust property of the Indians.

His role on the task force was involved in settling the disputes arising out of it. It all seems to me to be part and parcel of the same problem, and I don't really see the distinction.

MR. KRULITZ. Let me just add, Mr. Alexander, I agree completely with Mr. Moorman that it's always our posture in litigated matters where it's feasible to try to work towards a settlement or a solution of those problems, and I don't see that those two efforts are inconsistent at all.

MR. ALEXANDER. When the people testified in Seattle in August, they indicated that the proposal that they came up with, which in their view was not acceptable to any of the various participants in Washington State, was a dead issue at that time, and that it would be up to

you gentlemen on the Washington level to either come up with something new or—they weren't quite sure. Could you tell us in your view what the status of that proposal is today?

MR. MOORMAN. Well, that proposal was submitted to us, and you're correct. Nobody seemed to want us to adopt it, and we have not adopted it, nor have we prepared a substitute for it. And we have not made any final decision as to what we could do with that regional task force report. And at this moment it remains yet undecided, although we have the—the document has been distributed widely, and we think that's appropriate, but it has not been endorsed by the national task force.

MR. ALEXANDER. Is the national task force working on alternatives, perhaps including some of the elements of that plan, for eventual submission to Congress?

MR. MOORMAN. We, the national task force is not at this point attempting to prepare a plan which is similar, analogous, in terms of scope and format to that of the regional task force. And we don't believe that it's our general belief. I don't think that the task force is going to consider doing that. No one on the task force has proposed that we do that.

MR. ALEXANDER. Is the task force—

MR. MOORMAN. Excuse me. I might add, nor has, I believe, has anybody outside the government propose that we do it. In other words, I don't believe that's anything anyone is urging upon us.

MR. ALEXANDER. Is the task force working on a plan of perhaps shorter nature or are things sort of being held in abeyance until the Supreme Court rules on the recent argument?

MR. MOORMAN. The task force prepared—well, let me tell you what happened. The State of Washington through the Governor and the Attorney General submitted to the Attorney General of the United States and the Secretary of Interior a proposal to settle the *U.S. v. Washington* dispute. The people on the task force, working with OMB, prepared a draft counterproposal, which has never been submitted nor released to the public.

MR. ALEXANDER. When you say “not released to the public,” how would the lawyers of the various tribes fit into that?

MR. MOORMAN. It's been given to them.

MR. ALEXANDER. All of the lawyers representing the various interests?

MR. MOORMAN. I can't be sure about that, there's so many of them. And it was given to one—two particular lawyers for the purpose of further distribution to others, and I understand that they have not actually distributed it to others and, frankly, the situation is very confusing as to what they did or didn't do.

MR. ALEXANDER. As I understand it, either or both of you also served on task forces in relation to some of the Eastern land claims; is that correct?

MR. MOORMAN. Not with regard to myself.

MR. ALEXANDER. Mr. Krulitz?

MR. KRULITZ. With regard to the Eastern land claims, I have served on the administration work group with regard to the settlement of Maine Indian land claims. That work group really is no longer functioning; we're very close to a settlement of that problem which is agreeable to the tribes—although they have not yet voted on it—the State and OMB and the President. And so in essence that one is basically out of business.

In several other instances of Eastern Indian land claims, particularly two in New York and one in South Carolina, at my direction a staff level group has been formed in the two New York cases to—which involves representatives of the various members of Congress who are interested in it, representatives of the Governor of New York, and in those two New York cases that staff level working group or task force has met on and off for the past year or more trying to find solutions in that instance.

MR. ALEXANDER. Does that involve representatives of the tribes involved in the claim, also?

MR. KRULITZ. They have been meeting regularly with the tribes, the leadership of the tribes, the attorneys for the tribes. Basically the mission of that task force is to formulate the Federal position with regard to the settlement. And so it's a negotiation with—designed to be a negotiation with the Indian tribes rather than—

MR. ALEXANDER. A negotiation between parties?

MR. KRULITZ. Right.

MR. ALEXANDER. So, essentially, those working groups or East land claims task forces, whatever label has been attached to them, are a different process than the administration has tried to follow in the fisheries dispute?

MR. KRULITZ. Well, they come out of the same basic, I think, policy of this administration which is that these very complex, difficult Indian matters ought to be settled rather than litigated. Litigation leads to results that cannot be adequately adjusted in the litigation process. It requires legislation to adjust for some of these consequences.

Now, I do need to mention the South Carolina situation because I think that is different. We did start out in that instance with a relatively high-level task force that involved Eliot Cutler from OMB, Mr. Moorman, and myself. That effort has been terminated in terms of a task force approach, and the departments are now responding to that situation in our normal regular fashion. I think there was only one meeting of that group.

MR. ALEXANDER. In terms of the experiences from these several kinds of mediation-negotiation approaches to problem-solving, are there in a sense a set of lessons that have been learned that perhaps can be institutionalized for future Indian policy with respect to the various kinds of disputes that one can anticipate over the last several decades?

MR. KRULITZ. Let me answer—



MR. ALEXANDER. Because this is a fairly personal approach.

MR. KRULITZ. Let me answer first and then defer to Mr. Moorman. I don't think that—and we have given a great deal of thought to this, and others may disagree. My sense of it is that each case, each category of cases, whether it be water rights in the West where we have exactly the same problem and posture in terms of negotiation, each set of these problems is different. In many instances each case is different.

And I have not been able to find any kind of process that might be institutionalized in terms of resolving these problems. I don't know any other way to do it except to take them one by one.

MR. ALEXANDER. In terms of the fisheries dispute, for example, one possible alternative option, perhaps, was to have persons from outside of the agencies that also have operative responsibilities on different sides of the issues. That suggestion has been raised that somehow that inherently makes the negotiation process very difficult.

As the testimony in Seattle indicated, the non-Indians didn't trust the lawyers who were coming in who had just been in court against them, so to speak; various members of the Indian tribes don't "trust" some of the participants on the task force.

Is there a role for an institution or maybe an ad hoc system that works outside of the existing Indian bureaucracies, if you will?

MR. KRULITZ. My personal opinion is that in that specific instance I don't think—I mean, hindsight is always easier than foresight—I don't have a sense that some sort of outside institution like an Indian Claims Commission or some individual would make that—that detached individual would make that much difference.

As you know, the President in the Maine case involved Judge Gunther as sort of an outside individual. I think that Judge Gunther was very helpful in that process, but unfortunately it did not take it clear to the end of the process. And the reason is that there are just so many conflicting and different adjustments that need to be taken into account in any final solution that—including funding, and what have you. I don't see—you know, maybe there is. But I don't—at this point don't.

MR. ALEXANDER. Mr. Moorman, would you care to comment on my last two questions?

MR. MOORMAN. Well, one of the problems with litigation as a process is in many contexts it is difficult to fight-fight in litigation and talk-talk settlement at the same time.

MR. ALEXANDER. For sure.

MR. MOORMAN. This happens in many contexts. Tempers and passions aroused in the heat of litigation impede the ability to settle. So it's something that is just one of the facts of litigation, it appears. And the problem arises to a different height in different cases, and you never know what's going to occur.

That's why it's not a bad idea to think in terms of settling and mediating disputes before complaints are filed, when you get into the

court situation. The Department of Justice has a small unit called the Community Relations Service, which I'm sure you're aware of, which has done useful work in that regard. And I tend to look with favor upon it. I think that approaches of that type should be used to the greatest extent possible in these areas.

Once a matter is in litigation, though, I happen to feel that—I would have a tendency to disfavor the proliferation of the task force approach. I think the task force on the Pacific Northwest has been very useful. I still have some reservations about it in the context of litigation.

It would have a tendency to be conservative about involving, getting involved in—more than it would have to. In other words, I believe if you create a task force like that you have to examine very carefully, you have to come to the conclusion on its own merits and the context of that particular case, and you should do it.

But my presumption would be against doing it at the outset. I don't think it's feasible to create a permanent institution separate and apart from those conducting the litigation to settle litigation. It strikes me that creates a great deal of confusion, inefficiency, and it's fraught with many dangers for all involved.

MR. ALEXANDER. I would assume that the process is substantially different when you—in the Maine situation and a number of the Eastern claims, you have, maybe at best, have an initial stage of litigation having been conducted, and the fisheries case where you had concluded litigation, where from your client's point of views perhaps the issue was implementation of the rights secured by the United States representing them. Would that be accurate?

MR. KRULITZ. Let me answer it and then I'll defer to Mr. Moorman. I'm not—it is true that in the fisheries case the litigation was much further along—

MR. ALEXANDER. Cert had been denied once at that point?

MR. KRULITZ. That's correct. On the other hand, that particular matter was much further along in terms of the litigated solution than the Eastern Indian land claims, for example, where cases still are not filed in many instances.

On the other hand, the litigation in Washington State is ongoing. The judge has retained jurisdiction of the case. The court is, in effect, managing the fishery today. And so litigation there certainly is not concluded. And as you know, issues now are pending before the Supreme Court. But it was further along than the others.

MR. ALEXANDER. If, for example, the Supreme Court affirms the lower court's decision, will that at all affect the negotiation posture? When we spoke to the regional task force, they viewed their role as not—maybe I'm mischaracterizing it, but my recollection is—as not an implementation task force, not a way to implement the full decision, but to come to a solution between the parties that they all could live with. If the Supreme Court affirms *U.S. v. Washington* in its full extent,



could in fact your role change to determining a full implementation package? Was that within your charter?

MR. MOORMAN. Obviously, whatever the Supreme Court rules will have an affect on the case and what people do.

MR. ALEXANDER. Well, obviously yes, but prior to the United States going back and asking for the case to be reopened, many people viewed it as a final decision then, and it was not a decision of the United States, at least that anyone here is aware of, to go into Congress legislatively and try to affect an implementation program in terms of enforcement, as opposed to some sort of negotiated solution.

MR. MOORMAN. Is that a question?

MR. ALEXANDER. If you care to comment, sure.

MR. MOORMAN. I don't. You'll have to put it a little bit more precisely what you're trying to get at because—

MR. ALEXANDER. Well, I'm wondering if it is possible that your focus would shift from negotiation to an implementation-enforcement-legislative solution should the Supreme Court affirm the decision in its entirety. That's the question.

MR. MOORMAN. Well, it's hard to predict what one will do until one sees the decision.

MR. ALEXANDER. For sure it's a hypothetical question.

MR. MOORMAN. And I just am not prepared to deal with a hypothetical. But I can assure you that what the Supreme Court comes down with will be given very careful consideration in all of our actions and concerns. Obviously we are hopeful that the Supreme Court will uphold all of our efforts, and that will greatly strengthen our position vis-a-vis the State, in Congress, in the courts, before the public, and what have you. And it would obviously greatly affect, you know, our posture.

MR. ALEXANDER. Mr. Krulitz?

MR. KRULITZ. Well, I don't have any further comment beyond that except to say that I think we all have to recognize that we have a situation in Washington State today which is an absolute, total, unmitigated disaster. And the consequence of where we're at today is that the fishery, which is a very valuable resource, a very valuable tribal resource, is rapidly being destroyed. I mean, that's the fact that we're dealing with. And we're all trying to find some solution to that on behalf of the Indians and others. So—

MR. ALEXANDER. It's been the experience of this Commission in other areas where community emotions are extremely sharp and conflictual, that the actions of governmental officials right after unpopular court decisions and for the period continuing have had a significant impact on the eventual implementation or nonimplementation of that decision. In fact, the Ninth Circuit refers to these kinds of school segregation situations that the Commission has done a lot of work in as analogous in terms of battling the decision of the local Federal Court.



I'm curious as to whether or not the Department of Justice or the Department of Interior has in any way, shape, or form, as a public relations matter, if you will, as a statement of public policy, made a systematic attempt over the last 4 or 5 years to affirm, to support the judgment of the court, or whether it's been basically a fairly silent policy of the Government?

MR. MOORMAN. The Department of Justice, at least the Land and Natural Resources Division, has made *U.S. v. Washington* one of its number one priority matters, and has put significant resources and effort into bringing the case, weighing the case, enforcing the case, dealing with the case. Now, we've done all we can—

MR. ALEXANDER. I'm asking a separate factor, which is—

MR. MOORMAN. We've done all we can, all the Lands Division and Natural Resources Division can. I really can't speak as well for others.

MR. ALEXANDER. Mr. Krulitz, I guess I'm asking a separate question which is a question of the public officials who are responsible basically mounting a public relations campaign. It's come to our attention, for example, that a number of the local Federal officials have from time to time in the public press made statements that were extremely negative in relation to the court decision, and that such has been viewed in the public media, in the public media, as that if people who disagree with an opinion keep up the pressure that eventually the Government will be convinced to change its mind and not support the Indian rights. At least in the school desegregation setting the public responsibilities of public officials has been a very important determinant factor.

I just want to know if there's anything analogous, having been done in your agency, in terms of education of the public about the decision, press releases, statements that the law will be enforced, time and time again?

MR. MOORMAN. There is one thing that I will bring to your attention was that the Attorney General did issue a press release in 1977, when there appeared to be developing a tense enforcement situation in which he stated his confidence. The purpose of it was to bring to the public's attention his expectation that the people would comply with the law, and that the Department of Justice intended to enforce the decision. And I think that statement got rather wide publicity. Other than that, I know of nothing else the Department of Justice has done along that line, directed strictly to enforcement.

MR. ALEXANDER. Mr. Krulitz.

MR. KRULITZ. I might say that initially when we started this process there was a significant effort made to communicate with the public about the need to obey the law. And we, the members of the task force—and this was probably before Mr. Moorman got involved—spent some time in the State, meeting with various interest groups, various editorial boards, and what have you. Or people in Washington State regional task force has continued to work with the media and what have you. So, clearly it is the policy of the Depart-

ment of the Interior that the court's opinion and the rights of the Indians are to be upheld. Whether or not more can be done, I don't know.

MR. ALEXANDER. Mr. Chairman?

CHAIRMAN FLEMMING. Commissioner Ruiz?

COMMISSIONER RUIZ. How many cases are there wherein an Indian tribe has submitted its position to the Department of Justice as non-negotiable, wherein the Department of Justice has abandoned its role as settlement mediator and nevertheless gone ahead and sued on behalf of the Indians?

MR. MOORMAN. I don't understand the question because nothing comes to mind.

COMMISSIONER RUIZ. Well, we had a prior witness wherein he was referring to certain water rights, mineral rights, and his reference was to the fact that these items are nonnegotiable.

Now the word "negotiable" encompasses the word settlement; you're negotiating for settlement. And the question was if you can think of any situation wherein an Indian tribe, whether it be water rights, mineral rights, or whatsoever rights, has submitted its position to Justice as nonnegotiable and wherein Justice, perhaps trying to settle the situation, abandoned its role as a negotiator or as a settlor and nevertheless went ahead with the contentions by way of litigation, the contentions of the Indians. Is there such a situation?

MR. MOORMAN. I guess my answer is the same. Nothing comes to mind as a consequence of that.

COMMISSIONER RUIZ. You can think of no such case?

MR. MOORMAN. Nothing comes to mind.

COMMISSIONER RUIZ. How about Mr. Krulitz? Does anything come to mind to you on that setup?

MR. KRULITZ. Mr. Commissioner, if you have a specific case in mind, it would be very helpful to me to know about it because I'm having difficulty, as Mr. Moorman is, sort of relating to the question.

COMMISSIONER RUIZ. Well, I was simply repeating the testimony of one of the witnesses, an Indian witness. And if no such case comes to mind, apparently it's been encompassed by what you've done.

MR. MOORMAN. Well, it may have been, but nothing comes to my mind.

COMMISSIONER RUIZ. Very well. By the way, other than Oklahoma, are there trust oil-proven properties within the present boundaries of any of the Indian nations in the West and Southwest?

MR. MOORMAN. I defer to Mr. Krulitz.

MR. KRULITZ. Yes, sir. There are oil resources in New Mexico.

COMMISSIONER RUIZ. New Mexico?

MR. KRULITZ. New Mexico. Absolutely.

COMMISSIONER RUIZ. Other than New Mexico?

MR. KRULITZ. Mr. Commissioner, we just have to get you a list of those. I don't have that information in my mind.

COMMISSIONER RUIZ. Well, there are—

CHAIRMAN FLEMMING. It's satisfactory if you wanted to give us a statement on that and we can insert it in the record at this point.

MR. KRULITZ. Fine. I'm sure that there are many, many Indian tribes and reservations that have oil and gas resources.

COMMISSIONER RUIZ. I would like that statement in the record. No further questions.

CHAIRMAN FLEMMING. I'd like to pursue just a moment the *Washington* case. As I listened to the testimony I understand that the State of Washington put in a proposal or made a proposal to the Federal Government that was considered by the task force. Am I correct in concluding that it was considered by the task force?

MR. MOORMAN. It's been considered by the people on the task force. Whether it has—it has not been considered by the task force in a formal sense that there has been any task force action.

CHAIRMAN FLEMMING. But the Federal Government, after giving it consideration, has responded?

MR. MOORMAN. No.

CHAIRMAN FLEMMING. You haven't responded?

MR. MOORMAN. Have not responded.

CHAIRMAN FLEMMING. You have developed a proposed response; is that—

MR. MOORMAN. That's correct.

CHAIRMAN FLEMMING. Which is now under consideration?

MR. MOORMAN. That's correct.

CHAIRMAN FLEMMING. And that proposed response has been submitted to some of the legal representatives of the Indian community for their comment?

MR. MOORMAN. That's correct.

CHAIRMAN FLEMMING. Will you go any further with that prior to the Supreme Court decision on the *Washington* case, or is this just apt to be held in abeyance until that decision is handed down?

MR. MOORMAN. I think it will be inappropriate for me to respond to that question, Mr. Chairman, because that would be—

CHAIRMAN FLEMMING. Okay. Okay. That's perfectly okay. I'm just trying to get the feel of where it stood.

MR. MOORMAN. But as you would assume, all options are under consideration.

CHAIRMAN FLEMMING. Right. Right. In other words, there may be further discussion of that, further action on that?

MR. MOORMAN. There may or may not be.

CHAIRMAN FLEMMING. Commissioner Saltzman, do you have a question?

COMMISSIONER SALTZMAN. No.

CHAIRMAN FLEMMING. Mr. Nunez, do you have a question?

MR. NUNEZ. No.

CHAIRMAN FLEMMING. We appreciate very much both of you coming and helping us in this way. Thank you.



This completes testimony from witnesses who have been invited or subpoenaed to appear at this hearing. As we indicated at the opening of the hearing yesterday, it is the custom of the Commission to announce at the opening that if there are persons who desire to be heard who have not been invited or subpoenaed they may so indicate to the appropriate member of the staff no later than noon today, and if persons have indicated a desire to be heard, those persons' names will be called. They will be sworn and they will proceed under a strict 5-minute rule.

It is the practice of the Commission to enforce a 5-minute rule in connection with this part of our proceedings. I think the reasons for this are obvious. Sometimes we have quite a number of persons who want to be heard, other times not so many. I'm not aware of how many persons have indicated a desire to be heard at this time.

MR. SCHWARTZ. We have three, Mr. Chairman.

CHAIRMAN FLEMMING. We have three. Okay. If you will call the names of the three persons, and I'll ask them to take their place at the witness table and I'll administer the oath. They will be recognized in the order in which they indicated their desire to be heard, and counsel will give them 2-minute warnings, and then counsel will indicate when their time has expired.

MR. SCHWARTZ. Thank you. I'd just like to add to your remarks, Mr. Chairman, that the Commission does have statutory responsibility with respect to testimony which may defame, degrade, or incriminate any person, and that such testimony will not be received by the Commission and the witness will be asked to stop if such testimony is offered. That is a standard rule and also Commission policy. It's part of our statutory responsibility.

CHAIRMAN FLEMMING. It's very important to underline that.

MR. SCHWARTZ. And if the Chair agrees, could we make this a 1-minute warning?

CHAIRMAN FLEMMING. Fine, whatever.

MR. SCHWARTZ. In that case, it will be 5 minutes within which each witness may proceed to testify uninterrupted. I will give a 1-minute warning before the 5-minute period is up and the witness can proceed to testify until the 5 minutes are consumed. The three witnesses who have signed up are Mr. John Baily, William Big Springs, and Tim Coulter. Are Mr. John Baily and Mr. William Big Springs in the room?

Mr. Coulter, it appears that you are our open session. Would you—I'll check in the hall.

MR. COULTER. I must say the schedule has been a little unpredictable.

CHAIRMAN FLEMMING. We're right on schedule.

MR. COULTER. Yes, you are now.

MR. SCHWARTZ. There's the name of one other person who did not appear on my initial list, who did sign up. His name is Michael Dawes.

CHAIRMAN FLEMMING. Would you also take a seat at the witness table.

MR. SCHWARTZ. Would you each please rise and face the chairman?  
[Robert T. Coulter and Michael Dawes were sworn.]

CHAIRMAN FLEMMING. You might just repeat the rules in view of the fact that Mr. Dawes was not in the room.

MR. SCHWARTZ. Mr. Dawes, the rules, briefly, are these. There are 5 minutes for testimony which will be uninterrupted except by me 1 minute before the 5-minute period ends to let you know that there is only 1 minute remaining. The rules of the Commission and our statutory responsibility is that we cannot accept testimony that tends to defame, degrade, or incriminate any individual. We will adhere strictly to that rule.

CHAIRMAN FLEMMING. Might I say that when your 5 minutes is up you may complete the sentence, providing it isn't too long-winded. But also I'd like to say that if you have a statement or desire to extend your remarks later, we'd be more than happy to include the statement in the record of the hearing.

#### TESTIMONY OF ROBERT T. COULTER, DIRECTOR, INDIAN LAW RESOURCE CENTER

MR. SCHWARTZ. Mr. Coulter, we'll start with you. Would you begin your testimony by stating your full name, address, and occupation for the record, and then proceed with your testimony?

MR. COULTER. My name is Robert T. Coulter, or Tim Coulter, if you will. I am the director of the Indian Law Resource Center, a public interest, foundation-funded legal service organization serving Indian governments and Indian people throughout the country. We're located here in Washington.

I'm an attorney. I at one time worked for the Commission and felt that I was able to do some good in the short time that I did work for the Commission. I'm very unhappy about the way I've seen this hearing develop, and I recognize that it's probably not the responsibility of the Commissioners that things have developed the way they have.

I'm particularly concerned because I think the Commission is being denied an extremely important point of view, a point of view that is articulated by a very large segment of the Indian community, and by that I mean Indian governments all around the continent, a point of view that really should have been heard, that would have enlightened you on many of the points.

And I certainly commend the Commissioners themselves on some of the piercing, penetrating questions that were asked. That seemed to get at some of the issues that I think should have been raised in the hearing.

It was only at great pains that we were able to learn what the issues were that were going to be discussed here. It has been impossible to prepare a statement, since it wasn't possible to find out exactly who was going to testify and what they were going to testify about. I might

point out that we weren't even able to get a press release about the hearing, and I think that's extremely unfortunate because a great many people regard these things as very important.

The Commission has a reputation, as you rightly take some pride in, as being the conscience of the Federal Government, and yet we're not able to come here, we're not able to speak to you, at least some aren't. A certain few have been invited. A certain point of view has been very much represented and very much in evidence here.

Let me not extend my remarks too long because I think you may have some questions.

First of all, I think the Commissioners themselves began to poke some holes in the trust theory. I think you should know that there are a lot of people who think that the trust theory is a bunch of bunk, and I think Commissioner Ruiz was right on the money in attempting to nail down the terminology, and I think, quite frankly, was chasing the other attorney about the hearing room here and brought out very important views that in fact what goes as a legitimate legal relationship, that is, a trust relationship, is really nothing of the sort.

The trustee makes the rules himself, changes the rules at will, and is in fact accountable to absolutely no one other than himself. That's not a trust relationship. That's baloney. And to call it a trust relationship is just a misuse of legal terms and is terribly confusing.

And I think it would have been best if you had been able to have witnesses to present that point of view and perhaps explain that a bit. I think there are other extremely important issues that so far as I've been able to tell weren't touched at all, and they involve racism in the law. That is outright, bold racial discrimination.

And these issues weren't touched upon at all even though for at least a year and a half I've been bringing it to the attention of staff.

First of all, and in fact the man who sat right at this microphone last, Mr. Moorman, espouses, and his attorneys espouse, his Department espouses, what passes for a rule of law, and that rule of law is that the United States has the right and the authority to take—and I mean absolutely take—Indian land without due process, without compensation, and without any legal protection whatsoever. They take that position. It applies only to Indians. And they will not change it, although we have requested them to reconsider.

COMMISSIONER FLEMMING. Mr. Coulter, we have 1 more minute.

MR. COULTER. That should have been questioned, I think. I think we have an outright issue of racism in the law, and as far as I know, and this is what I saw, not a question was asked.

The same thing applies to the plenary power doctrine, the doctrine again espoused and recognized by the executive department, and certainly acted upon by Congress, that permits Congress to legislate in any manner they see fit with regard to Indians, and the courts will not overturn it.



They have never, ever declared an act of Congress unconstitutional which abridged Indian rights, ever. *Marbury v. Madison* has never been applied to Indians and neither has *Brown v. Board of Education*.

We're in the Dark Ages legally. The Commission really should be looking into these things. And I think it's a terrible shame that this hearing has not heard views on those subjects.

Thank you.

CHAIRMAN FLEMMING. As I indicated, we'll be very glad to have you extend your remarks in the form of a memorandum which the Commission would be very happy to consider.

MR. COULTER. Thank you.

TESTIMONY OF MICHAEL DAWES, EXECUTIVE DIRECTOR, NATIONAL  
ADVISORY COUNCIL ON INDIAN EDUCATION

MR. SCHWARTZ. Mr. Dawes, would you begin by stating your name, your address, your occupation, and then proceed with your testimony?

MR. DAWES. My name is Dr. Michael Dawes. I am executive director of National Advisory Council on Indian Education. My current address is Penn Building, suite 326, 425 13th Street, N.W., Washington, D.C.

My comments won't take 5 full minutes. I just want to bring our organization to the attention of the Commission and also bring out the fact that our congressional mandate states that we are to review the administration of programs undertaken by Title IV of the Indian Education Act.

I'm kind of a new guy on the job. I've been only on the job about 5 weeks now, but we are attempting to evaluate the effectiveness of some of these educational programs throughout the United States, and that's what my chairperson, Ms. Viola Peterson, and the members of our council are very intent upon doing in the days to come.

However, we're going to need some help from the Congress in order to get that job done. And I think that we've brought this out in our congressional testimony this year, several points that if we're to be an evaluative agency, if we are going to look at the effectiveness of Indian education programs, that we have to have not only the funds, but we have to have the backing of the Congress in order to get that job done.

It's not always an easy job to undertake. Also, I'd like to offer for the record a copy of our fifth annual report to the United States Congress, and along with our invitation to at any time if it were convenient for you, any member of the Commission, to come down to our office and meet our staff or to come before one of our full NACIE council meetings. We'll be more than happy to entertain you. I think that is about the extent of my statement.

CHAIRMAN FLEMMING. Thank you very much. We'd be very glad to make a copy of your report a part of the record of the hearing.

MR. SCHWARTZ. Mr. Chairman, I've just been informed that Mr. Baily who was called earlier is here and is prepared to testify.

CHAIRMAN FLEMMING. Okay. Would you stand and raise your right hand, please?

[John V. Baily was sworn.]

TESTIMONY OF JOHN V. BAILY, DIRECTOR, MICHIGAN COMMISSION ON INDIAN AFFAIRS

MR. SCHWARTZ. Mr. Baily, you will have 5 minutes to testify. I'll inform you 1 minute before the 5-minute period has ended. Would you please begin your testimony by stating your full name, address, and occupation for the record, and then go ahead with your testimony.

MR. BAILY. My name is John Vincent Baily. I reside at 6244 Yonker Street, Lansing, Michigan. I am the director of the Michigan Commission on Indian Affairs.

The reason I'm here today is to discuss some of the problems that we have in Michigan regarding the fishing rights. The controversy over fishing rights in Michigan has created a wave of racism that threatens to engulf the entire State's population for the next 100 years. Long-suppressed attitudes and uneducated beliefs regarding American Indians are now erupting with regularity in every community.

And this is a result of unsubstantiated articles that charge Michigan Indians of illegally fishing, and ignoring the fact that in April of 1971, in *The People v. Johndro*, the Michigan Supreme Court stated that Indians have the right to hunt and fish.

There's a great deal of rhetoric also about the rape and depletion of the resources of Great Lakes, but never any mention of the tearing-asunder and loss of good community relations between Indian people and others in their respective communities. It's the position of the Michigan Commission on Indian Affairs that the fishing dispute is a matter for Federal and tribal officials to decide because of the unique and long-established relationship between the Federal Government and sovereign and indigenous tribes in North America.

Our concern is the rapidly growing hatred being generated by those who feel their own interests have to be protected, while eroding the legal and social rights of American Indians. The pain suffered by Indian families, either directly or indirectly involved in the dispute, is unconscionable. Indian people have had to suffer almost in total silence because the suffering prompted by racial hatred and discrimination does not sell as well as impending threats of resource depletion, violence, and a final victory over Indian people.

The facts of the racial strife has been recognized by national magazines across the Nation, such as *The Nation* magazine, September 17, 1977.

My own father, for instance, who does not own any fishing apparatus, has feared for the safety of his life and other people because of vigilante groups moving unimpeded by local and State law enforcement officials. These same groups have been monitored by Indians and

others. The vigilantes are using citizen band radios to direct their efforts against Indian fishermen.

What we're concerned about is perhaps this inflammatory rhetoric would result in a death or maiming of a child or an adult on either side. These questions have been put aside and not—have been fully recognized as the major product of the fishing dispute. The citizenry of Michigan cannot afford to continue to allow the civil rights of its members to be violated, nor can they allow the children to become pawns in the cowboy and Indian game created by their parents.

Voluminous newspaper articles have assisted in creating this horrendous situation in which the innocent become the victims. And racial discrimination in Michigan is at an all-time high. I will submit to you some of the articles that have been written in the past year, and bear in mind that many of these pages are double-sided. And this is approximately a third of the articles generated in one year's time against Indian fishing.

In attachment two are some specific cases. For instance, in Traver City four Indian youths aged 13 years of age were fishing. They were approached by some older youths, approximately around 19. Their bikes were thrown into the river and they were beaten.

A local Indian senator went to the Rotary Club to ask them to assist in operating a preschool program, to find funds for this program, and the question was made, "What are you going to do, teach the Indian children to fish?"

CHAIRMAN FLEMMING. Mr. Baily, you have 1 more minute.

MR. BAILY. Thank you. There are other restaurants—I myself was a victim of discrimination in a restaurant; after ordering the food, we got it cold. When we left there were remarks made about Indians; there was whooping, hollering, that kind of thing.

There have been several instances where Indian children have been physically abused in the school systems, verbally abused by many of the teachers. In some of these cases there's been apologies by the teachers; other cases there haven't been. And we feel that the racial discrimination is going to erupt in violence in some form if moves aren't made to alleviate these conditions. Thank you.

CHAIRMAN FLEMMING. Thank you very much. We'll be very happy to have you submit the full statement with the attachments to us for inclusion in the record of the hearing at this point.

MR. BAILY. Okay. Thank you.

CHAIRMAN FLEMMING. Thank you very much. The other person did not show?

MR. SCHWARTZ. Is Mr. William Big Springs in the room?

[No response.]

MR. SCHWARTZ. Mr. Chairman, that's it.

CHAIRMAN FLEMMING. The hearing is adjourned.





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